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TEMPLE,
July, 1868.

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THE
LAW OF CONTRACTS.

LECTURE I.

ON THE NATURE AND CLASSIFICATION OF CONTRACTS,
AND ON CONTRACTS BY DEED.

THE whole practice of our English Courts of Common Law jurisdiction.

Common Law, if we except their criminal jurisdiction and their administration of the law of real property, to which may be added those cases which fall within the fiscal jurisdiction of the Court of Exchequer, may be distributed into two classes, *Contracts* and *Torts*. Of this you can easily satisfy yourselves by putting to your own minds any conceivable case of legal inquiry. If it do not involve a question of criminal law, or of the title to land, or of Exchequer jurisdiction, you will find that it resolves itself into a *contract* or a *tort*. Thus, suppose it to be the non-performance of a covenant, the non-payment of a bond, the dishonour of a bill of exchange, the non-payment of rent, the default of a surety,—these are all subjects of inquiry arising

from contracts. So, again, if it involve an assault on the person, an injury to the reputation by libel or slander, a nuisance to the dwelling, a conversion of property,—these are only so many descriptions of torts. And as the subjects of legal inquiry divide themselves, so do the forms in which the inquiry is carried on ; for all actions, as you are aware, are of TORT or of CONTRACT, a division which, as you see, is rendered necessary by the very nature of things, and does not result from any arbitrary principle of arrangement.

Now, therefore, the whole subject-matter of the inquiries about which our Courts of Law are conversant (excepting the cases I have excepted) being distributable into these two heads, *Contract* and *Tort*, I am about to take the former of them, that of *contract*, and to state those principles of every day recurrence which govern the law of England relative to contracts, and which it is absolutely necessary that every lawyer should bear constantly in mind, and have (to use the ordinary expression) at his fingers' ends, if he will avoid falling into egregious mistakes in the course of his daily practice.

Three classes
of contracts.

All contracts are divided by the Common Law of England into three classes :—

1. CONTRACTS BY MATTER OF RECORD.
2. CONTRACTS UNDER SEAL.
3. CONTRACTS NOT UNDER SEAL, OR SIMPLE CONTRACTS.

With regard to contracts by matter of record, ^{Contracts of record.} they are so little used in the ordinary affairs of private individuals, that I may dismiss them in a very few words. A Record is a memorial or remembrance on rolls of parchment (*a*) ; and such memorial is not a record until enrolled in the proper office (*b*). At an early period of our law, statutes merchant and statutes staple, which are both contracts of record for the payment of debts, were commonly in use. Subsequently, recognizances in the nature of a statute staple were established (*c*). These contracts are, however, now almost unheard of. The only contract of record with which we now occasionally meet is a recognizance, and that oftener in matters in which the Crown is concerned than between subject and subject. Thus an ordinary mode of compelling a witness to attend and prosecute or give evidence in a criminal case is by *recognizance*, in which he binds himself to the Queen in a certain sum conditioned for the performance of the duty imposed on him ; and in case of his making default, that sum accordingly becomes forfeited, and payable to Her Majesty. The commonest case of a recognizance between subject and subject was that of bail ; which has, however, become much less frequent

(*a*) Co. Litt. 260 a.

(*c*) 13 Ed. 1, stat. 3, c. 1 ;

(*b*) *Q. v. Hughes and others*, 27 Ed. 3, c. 9 ; 23 Hen. 8, 36 L. J. Privy Coun. 23 ; c. 6 ; 8 Geo. 1, c. 25.
Com. Dig. Record.

since the Act restraining the right to arrest on mesne process (*d*). It may be added that statutes and recognizances obtained or entered into in the name or upon account of Her Majesty, do not affect lands as to purchasers, unless registered under stat. 2 & 3 Vict. c. 11.

Incidents of
contracts of
record.

The peculiar incidents of contracts of record are, first, that like all records, they prove themselves; that is, their bare production, without any further proof, is sufficient evidence of their existence, should it be controverted.

Secondly, that, if it become necessary to enforce them, that may be done, if it be thought proper, by writ of scire facias,—a writ which lies on a record only, and cannot be made use of for the purpose of enforcing any other description of contract (*e*).

Thirdly, an obligation by record may be discharged by a release, an instrument which is always under seal (*f*).

However, as I said, the other two classes of contracts are those which are of most practical importance, and to them, therefore, my observations will be addressed. These, as I have said, are—

1. CONTRACTS BY DEED.

2. CONTRACTS WITHOUT DEED, OR SIMPLE CONTRACTS.

(*d*) 1 & 2 Vict. c. 110.

(*e*) Now regulated by 15 & 16 Vict. c. 76, s. 32.

(*f*) *Barker v. St. Quintin*, 12 M. & W. 441; Shepp. Touch. 322.

1. With regard to contracts by deed :

Contracts by deed.

A Deed is a written instrument, sealed and delivered (g).

Let us pause for a few moments to consider the parts of this definition.

In the first place, it is a written instrument, and this writing, the old books say, must be on paper or parchment ; for if it were written on linen, wood, or other substance, it would not be a deed (*h*). But, though every deed must be written (*i*), it is not necessary that every such instrument should be *signed*, for, at Common Law, signature was not essential (*k*) ; and, although by several statutes, particularly the Statute of Frauds (*l*), *signature* has been rendered essential to the validity of certain specified contracts, yet there are many contracts which are not affected by any statute ; and to these last-mentioned contracts, and also to those which are the subject of several sections of the Statute of Frauds (*m*), *if entered into by deed*, signature is not necessary (*n*).

Must be written.

Secondly, it must be *sealed and delivered*. This is the main distinction between a *deed* and any

Sealed and delivered.

(*g*) Co. Litt. 171 b. ; Shepp. Touch. 50. See *Hibblewhite v. M'Morine*, 6 M. & W. 200.

(*h*) Co. Litt. 35 b.

(*i*) Shep. Touch. 54.

(*k*) Id. 56.

(*l*) 29 Car. 2, c. 3.

(*m*) See Shepp. Touch. by

Preston, 56 ; *Cooch v. Goodman*, 2 Q. B. 580 ; *Aveline v. Whisson*, 4 M. & Gr. 801 ; *Cherry v. Heming*, 4 Exch. 631. See 2 Blackst. Comm. 305.

(*n*) Bac. Abr. *Obligation*, C.

other contract. The seal is an indispensable part of every deed, and so, except in case of the deed of a corporation (*o*), is the *delivery* (*p*). From this delivery it is a perfect deed, taking its effect from this essential part of its completion (*q*). It obviously follows immediately from this proposition that after delivery it cannot be altered—not even by filling up a blank (*r*). With regard to delivery, however, you must observe, that it is not absolutely necessary that the party executing should take the instrument into his hand and give it to the person for whose benefit it is intended (*s*); but as it is said by Lord Coke (*t*): “*a deed may be delivered by words without actual touch, or by touch without words.*” “The delivery,” his Lordship says, “is sufficient without any words; for, otherwise, a man who is mute could not deliver a deed And, as a deed may be delivered to the party without *words*, so may a deed be delivered by *words* without any *act* of delivery; as, if the writing sealed lieth on the table, and the feoffor or obligor saith to the feoffee or obligee, ‘Go and take up the writing, it is sufficient for you, *or* it will serve the turn, *or* take it as my deed,’ or the like words, it is a suffi-

(*o*) Case of Dean and Chap. of Furnes, Dav. Rep. 116; *Derby Canal Co. v. Wilmot*, 9 East, 360.

(*p*) Shepp. Touch. 57.

(*q*) *Goldard's case*, 2 Rep. 4 b.

(*r*) *Weeks v. Maillardet*, 14 East, 508; *Hibblewhite v. M'Morine*, 6 M. & W. 200.

(*s*) See *Goodright v. Straphan*, Cowp. 204, and Bac. Abr. *Obligation*, C.

(*t*) Co. Litt. 36 a.

cient delivery" (u). However, in practice, it is always safest and most advisable to follow the ordinary and regular course, which is, to cause the person who is to deliver the deed to place his finger on the seal, thereby acknowledging the seal to be his seal, and state that he delivers the instrument as his act and deed.

It is not necessary that the delivery should be to the person who is to take the benefit of the deed. The judgment in the case of *Doe d. Garmons v. Knight* (x), which was delivered by Sir John Bayley after a *curia advisari vult*, is worthy of a most careful perusal; the learning relating to this subject will be found there clearly collected and discussed. The inference which the Court, of which his Lordship was the organ, there drew from all the authorities on the subject was:—

To whom
delivered.

1st. "That, where an instrument is formally sealed and delivered, and there is nothing to qualify the delivery but the keeping the deed in the hands of the executing party, nothing to show that he did not intend it to operate immediately, that is a valid and effectual deed; and that delivery to the party who is to take by it, or any other person for his use, is not essential."

2nd. "That delivery to a third person for the use

(u) See further, *Doe d. Lloyd v. Bennett*, 8 Car. & P. 124; *Tupper v. Foulkes*, 30 L. J. (C. P.) 214. (x) 5 B. & C. 671. See *Botcherby v. Lancaster*, 1 A. & E. 77; *Doe d. Richards v. Lewis*, 20 L. J. (C. P.) 177.

of the party in whose favour a deed is made, where the grantor parts with all control over the deed, makes the deed effectual from the instant of such delivery."

Escrow.

Before quitting the subject of delivery, it is right to explain the distinction between a deed, ordinarily so termed, and an *escrow* (y). An escrow is a deed delivered conditionally to a third person, to be delivered to the person for whose benefit it purports to be, on some condition or other. If that condition be performed, it becomes an absolute deed; till then it continues an escrow, and, if the condition never be performed, it never becomes a deed at all (z). Thus, where at a meeting for executing a composition deed, for performance of which the defendant was to be surety, it was signed and sealed by him; but it had been previously agreed that the deed should not be operative unless all the creditors sealed it, and it was then delivered to one of the creditors, in order that he might get it executed by the others. This he failed to effect, and in an action against the defendant the deed was held to be a mere escrow. And even where a subscribing witness to a bond stated that it was attested, sealed, and delivered in the usual way, no other words than those which are usual on the execution of a bond being used by the defendant when he executed the instrument, but that before

(y) Shepp. Touch. 58.

(z) *Johnson v. Baker*, 4 B. & Ald. 440.

and at the time of the execution it was agreed that it should remain in his (the subscribing witness's) hands, until the death of Lord Stair, and until certain securities were given up, and that the bond was given up to him upon that condition, the Court held that it was a question of fact upon the whole evidence whether the bond was delivered as a deed to take effect from the moment of delivery, or whether it was delivered upon condition that it was not to operate as a deed until the death of Lord Stair, and until the notes were delivered up (a). The Lord Chief Justice, Lord *Tenterden*, laid down that if the instrument was delivered as the deed of the defendant binding on him *at the time*, although it was delivered on the faith and confidence which he reposed in the attesting witness (who was his attorney), that he would not part with it until the death of Lord Stair, and until the notes were delivered up, it immediately became the defendant's deed. And although the witness in fact parted with it before Lord Stair's death, and before the delivery up of the notes, in violation of the trust reposed in him, it was still the defendant's deed. But if the delivery itself *at the time* was conditional, so as not to constitute any present obligation, it was an escrow or writing merely, and not a deed, and the condition of the delivery having been broken it had never become the deed of the

(a) *Murray v. E. of Stair*, 33 L. J. (C. P.) 18, in 2 B. & C. 82; *Xenos v. Wick-* *ham*, 33 L. J. (C. P.) 18, in Ex. Ch.

defendant. But in order to make the delivery conditional, it was not necessary that any express words should be used at the time ; the conclusion was to be drawn from all the circumstances. It obviated all question as to the intention of the party, if at the time of delivery he expressly declared that he delivered it as an escrow ; but *that was not essential* to make it an escrow. And therefore, where a deed executed by one party is sent to the agent of the other in a letter explaining that it is executed only on condition of a counterpart being executed by the latter, such evidence has been considered sufficient to show that it was sent only as an escrow to take effect after execution of the counterpart (b).

This conditional delivery must be to some third person ; for, if it were to the party himself who is to be benefitted the deed would become absolute, though the party delivering were to say in express terms that he intended it to be conditional only ; for it is impossible by words to get rid of the legal operation of the delivery (c) ; and, therefore, where the defendant in debt on bond endeavoured to set up a delivery as an escrow to the obligee himself, the Court thought that the plea was so clearly bad, that they would not hear any argument upon the subject. Where, however, the deed is delivered

(b) *Furness v. Meek*, 27 L. J. (Ex.) 34. See *Millership v. Brookes*, 29 L. J. (Ex.) 369. (c) *Holford v. Parker*, Hob. 246 ; and Co. Litt. 36 a.

to a third person as an escrow, the delivery is, as I said, conditional ; and when the condition has been performed, it becomes absolute and takes effect, not from the date of performing the condition, but from the date of the original delivery ; so much so, that it has been held, that where a bond was delivered upon condition, and the obligor and obligee were both dead before the condition was performed, yet, on that event happening, it became the deed of the deceased obligor, so as to create a charge upon his assets as against his representatives (*d*).

It is therefore clear that in order to make a writing sealed and delivered an escrow merely, it is not necessary that express words should be used. You are to look at all the facts attending the execution, and to all that took place at the time, and therefore, although it be in form an absolute delivery, if it can reasonably be inferred that the writing was not to take effect as a deed till a certain condition should be performed, it will operate as an escrow (*e*).

Such, then, being the essentials of a deed—*writing* on paper or parchment, *sealing*, and *delivery*,—it is right to add, that, for the sake of convenience, deeds are divided into two classes, *Deeds*

Deeds poll and indentures.

(*d*) See *Graham v. Graham*, 1 Ves. jun. 272 ; *Froset v. Walsh*, Bridg. 51. *Besset*, 26 L. J. (Q. B.) 36 ; 6 E. & B. 986. See *Pym v. Campbell*, 25 L. J. (Q. B.)

(*e*) *Bowker v. Burdekin*, 11 M. & W. 128 ; *Gudgen v.* 277 ; 6 E. & B. 370.

Poll and *Indentures* (*f*). The names indeed of Deed Poll and Indenture were, as you probably all know, derived from the circumstance that the former was shaved or *polled*, as the old expression was, smooth at the edges, whereas the latter was cut or indented with teeth like a saw ; for, in the very old times, when deeds were short, it was the custom to write both parts on the same skin of parchment, and to write a word in large letters between the parts ; and then, this word being cut through saw fashion, each party took away half of it ; and if it became necessary to establish the identity of the instrument at a future time, they could do so by fitting them together, whereupon the word became legible (*g*). However, this, though the origin of the word *indenture*, has become a mere form ; and though, as you are all aware, such instruments are still indented by nicking the edge of the parchment, not teethwise, but in an undulating line, that is a mere form, and might (as it was said) (*h*) be done in Court during the progress of a trial if it had been forgotten till then. Now, however, it is expressly enacted (*i*), “that a deed executed after the 1st day of October, 1845, purporting to be an indenture, shall have the effect of an indenture although not actually indented.”

(*f*) Co. Litt. 35 b. ; Shepp. Touch. 50.

(*g*) Co. Litt. 229 a. ; 2 Bl. Comm. 295.

(*h*) Bac. Abr. *Leases*, E. 2, note. But see 54 Geo. 3, c. 96.

(*i*) 8 & 9 Vict. c. 106, s. 5.

There are one or two peculiarities of contracts made by deed, which, as they apply to all contracts so made, this is the proper place to notice.

In the first place, *a contract by deed requires no consideration to support it* (k); or perhaps it might be more correct to say, as a general proposition, that the law conclusively presumes that it is made upon a good and sufficient consideration (l). The importance of this arises from the strong line of *distinction it creates between Contracts by Deed and Simple Contracts*. For a simple contract, that is, a contract by words or by writing not under seal, requires, as I shall hereafter have occasion to explain more at length (m), a consideration to support it and give it validity. For instance, suppose a written promise in these words;—"I, A. B., promise C. D. that I will pay the debt he owes to E. F." This promise would be absolutely void unless it could be shown to have been made in consideration of something given or granted to A. B. for making it; for it would be a promise by him to undertake a liability without any consideration or recompense whatever; and, if he neglected to perform it, no action would lie against him, for the maxim, *ex nudo pacto non oritur actio*, would intervene for his protection. But, if to that very instrument, conceived in those very words, the

No considera-
tion necessary.

(k) *Shubrick v. Salmond*, 3 Q. B. 590.
Burr. 1639.

(m) Lectures 4 & 5.

(l) *Coch v. Goodman*, 2

additional solemnity of sealing and delivery were added, so as to make it a deed, it would become a good and binding covenant on which an action might be supported (*n*) ; and this is on account of the greater formality and solemnity of such an instrument (*o*). The reason of these different rules cannot be better expressed than in the words of *Plowden* : “ There are two ways of making contracts or agreements for lands and chattels. The one is by words, which is the inferior method, the other is by writing (*i. e.*, by Deed), which is the superior, and because words are oftentimes spoken by men unadvisedly and without deliberation, the law has provided that a contract by words shall not bind without consideration. As if I promise to give £20 to make your sale *de novo*, here you shall not have an action against me for the £20, as it is affirmed in 17 Edward IV., for it is a nude pact, *et ex nudo pacto non oritur actio*. And the reason is, because it is by words which pass from men lightly and inconsiderately ; but where the agreement is by deed, there is more time for deliberation. For when a man passes a thing by deed, first there is the determination of the mind to do it, and upon that he causes it to be written, which is one part of deliberation, and afterwards he puts his seal to it, which is another part of deliberation, and, lastly,

(*n*) See *Fallowes v. Taylor*, 7 T. R. 477. *ton*, *Plowd.* 308 a. ; *Cruise*, *Dig. tit. xxxii. c. 11, ss. 54*

(*o*) See *Sharington v. Strot-* and 55.

he delivers the writing as his deed, which is the consummation of his resolution; and by the delivery of the deed from him that makes it to him to whom it is made, he gives his assent to part with the thing contained in the deed to him to whom he delivers the deed, and this delivery is as a ceremony in law signifying fully his good will that the thing in the deed should pass from him to the other. So that there is great deliberation used in the making of deeds, for which reason they are received as a lien final to the party, and are adjudged to bind the party without examining upon what cause or consideration they were made. And, therefore, in the case put in 17 Edward IV., put it thus, that I by deed promise to give you £20 to make your sale *de novo*; here you shall have an action of debt upon this deed, and the consideration is not examinable, for in the deed there is a sufficient consideration, viz., the will of the party that made the deed. And so where a carpenter, by parol without writing undertook to build a new house, and for not doing it the party in 11 H. IV. brought an action of covenant against the carpenter. There it does not appear that he should have anything for building the house, and it was adjudged the plaintiff should take nothing by the writ. But if it had been by speciality it would have been otherwise. So that where it is by deed, the cause or consideration is not inquirable, nor is it to be weighed, but the party ought only to answer to the deed, and if he

confesses it to be his deed he shall be bound, for every deed imports in itself a consideration, viz., the will of him that made it, and, therefore, where the agreement is by deed, it shall never be called a *nudum pactum*. And in an action of debt upon an obligation, the consideration upon which the party made the deed is not to be inquired, for it is sufficient to say that it was his will to make the deed" (*p*). Thus, although a promise to make a woman an allowance for her maintenance in consideration of past seduction is invalid, *past* seduction being, for reasons given in another place (*q*), no consideration in law ; yet, inasmuch as an instrument under seal is good without any consideration, a bond for maintenance founded on previous seduction is good (*r*).

There are, however, some deeds deriving their effect from the Statute of Uses (*s*), that is, a bargain and sale, and a covenant to stand seised to uses, both of which are void without a consideration ; the first requiring a pecuniary one, and the latter a consideration of blood or marriage (*t*). Contracts in restraint of trade also are void, if made without consideration, although under seal (*u*).

(*p*) Plowd. 308 a., supra.

(*q*) *Beaumont v. Reeve*, 8 Q. B. 483.

(*r*) *Turner v. Vaughan*, 1 Wills. 339 b., 2nd part ; *Nye v. Mosely*, 6 B. & C. 133.

(*s*) 27 Hen. VIII. c. 10.

(*t*) Shepp. Touch. 510 ; 2 Bl. Comm. 338.

(*u*) *Mitchell v. Reynolds*, 1 P. Wms. 181. See *Wallis v. Day*, 2 M. & W. 277 ; *Horner v. Graves*, 7 Bing. 744 ; *Hutton v. Parker*, 7 Dowl. 739 ;

But here, again, you must observe another well-known and important distinction, namely, that though it is not necessary to show on what consideration a deed is founded, a party sued on it is always, on his part, allowed to show that it was founded on an illegal or immoral consideration, or that it was obtained by duress or by fraud; for, were the law otherwise, deeds would, to use the expression of Lord *Ellenborough* (x), be made use of as covers for every species of wickedness and illegality. It is therefore a well-established proposition, that a deed may be invalidated by showing that it is tainted by such circumstances (y). And it signifies not whether the illegality objected to it be a breach of the rules of common law, or consist in the contravention of the provisions of some statute, or whether the prohibition of the statute be expressed in direct terms, or be left to be collected from a penalty being inflicted on the offender (z). Thus, in *Collins v. Blantern*, the consideration was the compromise of an indictment for perjury; in *Coppock v. Bower* (a), the compromise of an election petition; in *Hindley v. M. of Westmeath* (b), a

Illegality of consideration.

Mallan v. May, 11 M. & W. 665. See *Tallis v. Tallis*, 22 L. F. (Q. B.) 185; 1 E. & B. 39.

(x) *Paxton v. Popham*, 9 East, 421.

(y) See *Collins v. Blantern*, 2 Wils. 341; 1 Smith L. C. 310, 5th ed.

(z) *Bartlett v. Vinor*, Carth. 251; *Cundell v. Dawson*, 4 C. B. 376; *Ritchie v. Smith*, 6 C. B. 462; *Cope v. Rowlands*, 2 M. & W. 149; *M'Kinnell v. Robinson*, 3 M. & W. 434.

(a) 4 M. & W. 361.

(b) 6 B. & C. 200.

future separation between husband and wife (c). In these cases the illegality consisted in the infringement of the rule of the common law, which looks upon such contracts as improper. In other cases, as I said, the contravention of a statute has been held equally fatal : as, of the statutes against gaming (d); of the Acts for licensing playhouses (e) : of the stat 9 Anne, c. 16, for requiring brokers acting within the city and liberties of London to procure themselves to be admitted by the Lord Mayor and Aldermen (f). And a great variety of examples might be given, but these are sufficient to establish the principle, that, though a man cannot defend himself from liability upon his contract made by deed, by saying that there was no consideration for it, he may by saying that there was an illegal one. And it must be observed, that a contract, although not expressly prohibited by a statute, may be illegal, if opposed to the general policy and intent thereof, as if made to insure to one creditor of a bankrupt a greater share of his debt than the others can have (g) ; or a contract

(c) See *Jones v. Waite*, 5 Bing. N. C. 341, 4 M. & Gr. 1104, in Dom. Proc. ; *Wilson v. Wilson*, 23 L. J. (Ch.) 697.

(d) *Colborne v. Stockdale*, Str. 493 ; *Mazzinghi v. Stephenson*, 1 Camp. 291. See *M'Kinnell v. Robinson*, 3 M. & W. 434, which, however, was

a simple contract.

(e) *Levy v. Yates*, 8 A. & E. 129. See *De Begnis v. Armistead*, 10 Bing. 110, per Tindal, C. J.

(f) *Cope v. Rowlands*, 2 M. & W. 149.

(g) *Staines v. Wainewright*, 6 Bing. N. C. 174. See *Ex*

made in order to enable another to infringe that policy and intent (*h*), as if money be lent in order to enable the borrower to pay or compound differences on illegal stock-jobbing transactions, although the lender was no party to them. These contracts are invalid, and cannot be sued upon, although under seal. Even if there were several considerations, and any one of them was illegal, it avoids the whole instrument; for it is impossible to say how much or how little weight the illegal portion may have had in inducing the execution of the entire contract (*i*). Thus, the plaintiffs, who were proprietors of a newspaper, having at the defendant's request published in it a libel, and one Chalmers having sued them upon it, the defendant, in consideration that they would defend the action, undertook to indemnify them from all damages and costs to which they might be liable on account of having published the libel and of defending the action; but it was decided, that, as the part of the consideration of this indemnity, consisting of the publication of the libel, was illegal, the whole contract was tainted with this illegality, and no action upon the indemnity could be supported (*k*).

parte Oliver, Re Hodgson, 4 De G. & S. 354.

(*h*) *M'Kinnell v. Robinson*, 3 M. & W. 434; *Cannan v. Brice*, 3 B. & Ald. 179; *De Begnis v. Armistead*, 10 Bing. 110.

(*i*) *Waite v. Jones*, 1 Bing. N. C. 662, per *Tindal*, C. J.; *Shackell v. Rosier*, 2 Bing. N. C. 634; *Howden v. Haigh*, 11 A. & E. 1033.

(*k*) *Shackell v. Rosier*, 2 Bing. N. C. 634.

Legal and
illegal cove-
nants.

Though it is just the reverse where the consideration is good, and there are several covenants, some legal, some illegal: for then the illegal promises alone will be void, and the legal valid (*l*). As when, upon a dissolution of partnership, one partner purchased the other's moiety, and the latter covenanted not to carry on a similar trade within the cities of London and Westminster, or within 600 miles thereof, the Exchequer Chamber held that the covenant was void as to the 600 miles, as an unreasonable restraint of trade; but good as to the cities of London and Westminster (*m*).

Estoppel.

The next quality of a contract by deed is its operation by way of *estoppel*; the meaning of which is, that the person executing it is not permitted to contravene or disprove what he has there asserted, though he may do so where the assertion is in a contract not under seal. A good example of this is the case of a receipt. A creditor who has given a receipt not under seal is nevertheless permitted to prove that he has not received the money (*n*); but it is otherwise if the receipt be by deed, for then the law admits no evidence to the contrary (*o*). Such is the nature of what we call

(*l*) *Gaskell v. King*, 11 East, 165; *How v. Synge*, 15 East, 440.

(*m*) *Price v. Green*, 16 M. & W. 346; *Nicholls v. Stretton*, 10 Q. B. 346.

(*n*) *Graves v. Key*, 3 B. & Ad. 313; *Stratton v. Rastall*, 2

T. R. 366; *Farrer v. Hutchinson*, 9 A. & E. 641; *Bowes v. Foster*, 27 L. J. (Ex.) 262; 2 H. & N. 779.

(*o*) See the judgment of the Court in *Fitch v. Sutton*, 5 East, 230.

an *estoppel* created by deed (*p*), the principle of which is explained by *Taunton*, J., in *Bowman v. Taylor* (*q*) : "The principle is, that, where a man has entered into a solemn engagement by and under his hand and seal as to certain facts, he shall not be permitted to deny any matter he has so asserted ;" and therefore, for example, if a distinct statement of a particular fact is made in the recital of a bond or other instrument under seal, and a contract is made with reference to that recital, it is unquestionably true, that, as between the parties to that instrument, and in an action upon it, it is not competent for the party bound to deny the recital (*r*). But an allegation must, in order to operate as an *estoppel*, be clear, distinct, and definite (*s*). As where A. having an equitable estate in fee in certain lands, mortgaged them to B., reciting in the instrument of mortgage that he was legally or equitably entitled to them. He afterwards obtained the legal estate, and conveyed the latter to C. The Court of King's Bench held that, there being in the instrument of mortgage no

(*p*) *Shelley v. Wright*, Willes, 9 ; *Hill v. Manchester and Salford Waterworks*, 2 B. & Ad. 544.

(*q*) 2 A. & E. 278.

(*r*) *Carpenter v. Buller*, 8 M. & W. 209 ; *Pilbrow v. Pilbrow's Atmospheric R. C.*, 5 C. B. 440 ; *Young v. Rain-*

cock, 7 C. B. 310 ; *Stronghill v. Buck*, 19 L. J. (Q. B.) 209 ; 14 Q. B. 781. See per *Wood*, V. C., in *Carter v. Carter*, 27 L. J. (Ch.) 74.

(*s*) *Right d. Jeffereys v. Bucknell*, 2 B. & Ad. 278 ; *Lainson v. Tremere*, 1 A. & E. 792.

certain and precise averment of any seisin in A., but merely a recital that he was *legally or equitably* entitled, C., who claimed under A., was not estopped from setting up against B. the legal estate so acquired by him (t). Such a recital is indeed the hypothesis upon which the contract is made by the parties; and therefore it would quite overthrow their mutual intention, if, in the absence of fraud, the recital could be denied. For the same reason, the *estoppel* has no effect in matters not depending upon that contract; thus even a party to a deed is not estopped in an action by another party, not founded on the deed but wholly collateral to it, from disputing the facts so admitted therein (u). In such case evidence of the circumstances under which the admission was made, is receivable to show that it was inconsiderately made, and is not entitled to weight as a proof of the fact it is used to establish (x). For the same reason, if all the facts appear by the deed, a party thereto is not estopped from averring them although they are contradictory to some part of the deed (y). An instructive instance of an estoppel is afforded by the case of *Wiles v. Woodward* (z). In this case the plaintiff

(t) 2 B. & Ad. 278; supra.	Compare <i>Dancer v. Hastings</i> ,
(u) <i>Carter v. Carter</i> , supra.	4 Bing. 2, with <i>Jolly v.</i>
<i>Fraser v. Pendlebury</i> , 31 L. J.	<i>Arbuthnot</i> , 28 L. J. (Ch.)
(C. P.) 1.	274; <i>Rowbotham v. Wilson</i> ,
(x) <i>Carpenter v. Buller</i> , supra.	27 L. J. (Q. B.) 61, per <i>Wat-</i>
(y) Co. Litt. 352 B. <i>Par-</i>	<i>son</i> , B.; 8 E. & B. 123.
<i>geter v. Harris</i> , 7 Q. B. 708.	(z) 5 Exch. 557.

and defendant had been in partnership together as paper manufacturers and iron merchants. The partnership was dissolved by deed, by which it was recited that an agreement had been made that the defendant should have all the stock in trade of the business of paper merchants, but that the plaintiff should receive paper out of that stock to the value of £898 4s. 11*d.*, which was to remain in the paper mill for a year. On the other hand, the plaintiff was to have the stock in trade in the iron business. The deed further recited, that, in pursuance of that arrangement, paper of that value had been actually delivered to the plaintiff, and that the same then was in the paper mill, as the plaintiff acknowledged. It then contained an assignment by the defendant to the plaintiff of all the stock in trade of the iron business, and by the plaintiff to the defendant of all the stock in trade of the paper making business, except the £898 4s. 11*d.* worth of paper delivered to the plaintiff, and mutual releases, and a dissolution of the old partnership. In fact no paper had been delivered or set apart; and in an action of trover for it, it was contended by the defendant, that no certain quantity having become the property of the plaintiff, no definite paper could be said to be his; and consequently, that an action of trover, not being an action on the deed, and which implies that the thing sued for is the plaintiff's, could not be supported. But the Court of Exchequer considered that the parties were estopped.

by the deed, not merely in an action thereon, but in this proceeding, which was to enforce the rights arising out of it; and the Court said, that a recital, when it is of a fact agreed upon by both, binds both; and the present claim is not collateral to the deed, as in *Carpenter v. Buller*. It is, therefore, an estoppel on both. The parties have agreed, with respect to the stock in trade in the paper business, that they should stand precisely in the same situation as if the stock had been divided, and that part amounting to the stipulated sum had been delivered to the plaintiff; and, being in that situation, the question is what their respective rights are.

Before quitting this head of Estoppel, it must be observed that as the deed takes effect from the delivery, not from the date, neither party can be estopped from showing the real date of the delivery, although by doing so a very different meaning may be given to the deed from that which would be given to it if the parties were estopped from denying that the date was the time from which the deed commenced in effect. Thus, where a charter-party, dated 6th February, contained a covenant that a ship should proceed from Demerara, where she then lay, on or before 12th February, but the Charter party was, in fact, not executed till 15th March; it was held that the owner might recover his freight, although the ship did not sail on or before the 12th of February. For even treating the stipulation as originally intended to be a

condition precedent, the parties had, by rendering it impossible, dispensed with its performance (a).

But notwithstanding the strong terms in which estoppel is often described as peculiar to a deed, it must not be supposed that a party cannot be estopped by any other Act (b), although estoppel by deed is much the most frequent. "Touching estoppels, which is an excellent and curious part of learning," says Lord *Coke* (c), "it is to be observed that there be three kinds of estoppels, viz., by matter of record, by matter in writing (i.e., by deed), and by matter in pais. By matter of record, viz., by letters patent, fine, recovery, pleading, taking of continuance, confession, imparlance, warrant of attorney, admittance"—some of which records are now obsolete. "By matter in writing, as by deed,"—of which we have already treated. "By matter in pais as by livery, by entry, by acceptance of rent, by partition, by acceptance of an estate, whereof Littleton maketh a special observation, that a man shall be estopped by matter in the country without any writing." Of estoppel, by matter of record, it is not requisite to say more ; but one or two examples of estoppel in pais will be useful, both as showing that the force of an estoppel is not peculiar to a deed, and as illustrating still further the grounds and reasons of

Other
estoppels.

(a) *Hall v. Cozenove*, 4 East, 477. *North Western Railway*, 34 L. J. (Ex.) 39.

(b) *M'Cance v. London and* (c) Co. Litt. 352.

estoppel by deed itself. In *Pickard v. Sears* (d) it was laid down by the Court of Queen's Bench that the rule of law is clear, that where one, by his words or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position; the former is concluded from averring against the latter a different state of things as existing at the same time. "This proposition, says the Court of Exchequer, in *Freeman v. Cooke* (e), must be considered as established. By the term wilfully, however, in that rule, we must understand, if not that the party represents that to be true, which he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted upon accordingly; and if whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct by negligence or omission, where there is a duty upon a person by usage of trade or otherwise to disclose the truth, may often have the same effect. For instance, a retiring partner omitting to inform his customers of the fact in the usual

(d) 6 A. & E. 474; *Heane* Ex. Rep. 663; see 6 H. of L. C. 656.
v. *Rogers*, 9 B. & C. 586.

(e) *Freeman v. Cooke*, 2

mode that the continuing partners are no longer authorised to act as his agents, is bound by all contracts made by them with third persons, on the faith of their being so authorised." In a very recent case a clerk to a deceased merchant sold a part of his personal estate to the defendant with the consent of A., who claimed an interest therein, and by agreement between the three, drew, in the name of the deceased, a bill of exchange on the defendant for the price, and indorsed it to A. also in the name of the deceased, and the defendant accepted the bill after it had been so drawn and indorsed. It was held that the defendant having been sued by an indorser of the bill, was estopped by his own acts and agreement, from denying that the bill was indorsed by the deceased (*f*).

From this pre-eminent force of a deed is derived *Merger.* its next peculiarity, which is its effect in creating a *merger*. This happens when an engagement has been made by way of simple contract, that is, by words in writing not under seal, and afterwards the very same (*g*) engagement is entered into between the same parties by a deed. When this happens, the simple contract is merged, lost, sunk, as it were, and swallowed up in that under seal, and becomes totally extinguished (*h*). Suppose, for instance, I

(*f*) *Aspitel v. Bryan*, 33 L. J. (Q. B.) 328. (*h*) *Price v. Moulton*, 20 L. J. (C. B.) 102 ; 10 C. B.

(*g*) See *Yates v. Aston*, 4 Q. B. 182. 561.

give my creditor a promissory note for £50, and then a bond for the same demand, the note is lost, swallowed up in the bond, and becomes totally extinct and useless (*i*). Or, if a devisee, in trust to sell lands and pay debts of the devisor out of the proceeds, borrow money for that purpose, and by indenture between him and the lender charges the land with the amount, and covenants to pay the money borrowed out of such money as shall come to his hands as such trustee, it is obvious that the claim of the lender is upon the covenant, and that the simple contract which arose from the borrowing is sunk in the special agreement (*k*). It is almost obvious that in these cases the engagement by deed must be so completely identical with that by the simple contract, that the remedy thereupon must be co-extensive with the latter (*l*). As, where a banker takes from a customer and a surety a bond for payment of all sums advanced, or to be advanced, to the customer, there is no merger, for the special contract differs from the simple in securing the payment of other and additional moneys, and also from another and additional person (*m*). So also when two out of three simple contract debtors give a specialty security for the debt, it was held, that

(*i*) Bayley on Bills, 6th B. 20. See *Boaler v. Mayor*,
edition, 334. 34 L. J. (C. P.) 230.

(*k*) *Mathew v. Blackmore*, 26 L. J. (Ex.) 150 ; 1 H. & N. 76. (*m*) *Holmes v. Bell*, 3 M. &
G. 213 ; *Norfolk Railway v.*

(*l*) *Ansell v. Baker*, 15 Q. *M'Namara*, 3 Ex. 628.

the simple contract liability was not merged in the specialty and that assumpsit lay (*n*).

From the same ground of the pre-eminence of a deed is derived another peculiar incident to a contract so made, namely, that its obligation cannot be got rid of by any matter of inferior degree: thus, a verbal license will not exempt a man from liability for breach of his covenant (*o*). The reason of this rule is so clearly expressed in the *Countess of Rutland's case* (*p*) that it is worth while to introduce it in the words of Lord Coke: "It would be inconvenient that matters in writing, made by advice and on consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by averment of the parties, to be proved by the uncertain testimony of slippery memory. And it would be dangerous to purchasers and all others in such case, if such nude averments against matter in writing should be admitted." The last case on this subject is *West v. Blakeway* (*q*); there a tenant had covenanted not to remove a greenhouse, and it was held no defence for him against an action for so doing, that he had his landlord's subsequent permission so to do, that permission not being shown to have been under seal. "It is a

Deed cannot
be got rid of
by parol.

(*n*) *Sharp v. Gibbs*, C. P.
12 W. R. 711.

(*p*) 5 Co. Rep. 25.

(*o*) See *Cocks v. Nash*, 9
Bing. 341; *Wood v. Lead-*
bitter, 13 M. & W. 838.

(*q*) 2 M. & Gr. 729; *Doe*
dem. *Muston v. Gladwin*, 6
Q. B. 953.

well-known rule of law," said the Lord Chief Justice, "that *unumquodque ligamen dissolvitur eodem ligamine quo et ligatur*. This is so well established," continued his Lordship, "that it appears to me unnecessary to refer to cases. I will mention only *Rogers v. Payne* (r), which was an action of covenant for the non-payment of money; the defendant pleaded a parol discharge in satisfaction of all demands. It was held upon demurrer that the covenant could not be discharged without deed, and *Blake's case* (s) was cited."

When
covenant
assignable.

It is another advantage of a contract by deed over a simple contract (t), that although, as is well known, a chose in action is not assignable by law (u), yet, where the contract is one between landlord and tenant, and is such as in its nature to affect directly the estates of either of them, which in law is called running with the land (x), the benefit and the burthen of that contract when under seal will, if the estate of either is assigned, pass with the reversion or the term to the new landlord or to the new tenant. This is partly by force of the common law, and partly by force of the stat. 32 Hen. VIII.,

(r) 2 Wils. 376.

(s) 6 Co. Rep. 43 b. See also *Harris v. Goodwyn*, 2 M. & Gr. 405. See *Nash v. Armstrong*, 30 L. J. (C. P.) 286.

(t) *Standen v. Christmas*, 16 L. J. (Q. B.) 265; 10 Q. B. 135; *Brydges v. Lewis*, 3 Q. B.

603.

(u) Com. Dig. Assignment, C. 1, Id. Grant, D.

(x) *Spencer's case*, 5 Co. Rep. 16; 1 Smith, L. C. 43, 5th ed.; *Vernon v. Smith*, 5 B. & Ald. 1.

c. 34 (y), an Act passed shortly after the dissolution of the monasteries, and rendered necessary thereby. For, as by the common law, neither the benefit nor the burthen of a contract could in general be transferred by assignment, it became necessary, when so many reversions of estates held by farmers and tenants, for lives or years, were alienated, to give to the purchasers or alienees the same rights against the farmers or tenants as the lessors had; and the legislature naturally and equitably went on to give corresponding rights to the farmers and tenants.

Again, a deed has this further advantage of a simple contract, that, in case of the death of the party bound by it, it charges his heirs (if the deceased bound his heirs by using words for that purpose in the deed) to the extent of any assets that may have descended to them (z).

Deeds charge the heirs of those bound by them.

You will find the nature of the heir's liability fully explained in the notes to *Jefferson v. Morton* (a). If, indeed, the debtor had devised the land away, instead of allowing it to descend to his heir, the creditor could not at common law have sued the devisee. However, by stat. 3 Wm. III., c. 14, usually called the Statute of Fraudulent Devises, the devisee was made liable as well as the heir. But, as this statute did not provide for the case of

(y) *Thursby v. Plant*, 1 2, Id. Assets, A.
Wms. Saund. 240. (a) 2 Wms. Saund. 6.
(z) Com. Dig. Covenant, C.

their being no heir, the land in that event going to the lord by escheat if there was no devisee, or to the devisee if one was designated by the will ; a distinction which it is sometimes important to observe (*b*), it was repealed, and its enactments repeated, making the devisee in such case liable, with several other improvements, by stat. 1 Wm. IV., c. 47, usually called Sir Edward Sugden's Act (*c*), one of the many valuable alterations in the law which the country owes to Lord *St. Leonards*.

While on this subject, it may as well be mentioned, that, although the right of bringing an action against the heir or devisee is limited to specialty creditors, yet, by a statute of 3 & 4 Wm. IV., c. 104, the simple contract creditors have a remedy against the real estate of the deceased in equity, where, however, their claims are, by the express enactment of the statute, postponed to those of creditors by deed in which the heirs of the deceased are mentioned. And by this Act lands escheating for want of heirs are made assets (*d*).

In the administration of the personal effects, also, the specialty creditors have, as you are probably aware, a priority over those by simple contract (*e*).

(*b*) *Hunting v. Sheldrake*, 9 M. & W. 256. *Briant*, 3 A. & E. 839.

(*c*) See *Hunting v. Sheldrake*, 9 M. & W. 263. On the construction of statute 3 W. & M. 114; *Cummins v. Cummins*, 3 J. & L. 64.

(*d*) *Evans v. Brown*, 5 Beav. 114; *Cummins v. Cummins*, 3 J. & L. 64. (*e*) *Pinchorn's case*, 9 Co. Rep. 88 b.

The occasions on which for the most part this important instrument is necessary must now be mentioned. It will be recollected that all property is in its nature tangible or intangible, or as it is called in law, corporeal or incorporeal. Real property of the corporeal kind being capable of actual delivery, may, by the common law, be aliened or transferred by delivery alone without deed, and is therefore said to lie in livery; while that of the incorporeal kind, being incapable of delivery, requires some other mode to be used for authenticating its alienation or transfer, which mode is a deed (*f*), and therefore such property is said to lie in grant (*g*). Although the older authorities speak of incorporeal *inheritances*, there is no doubt that the principle does not depend on the quantity of interest granted or transferred, but on the nature of the subject-matter: a right of common, for instance, which is a profit, *à prendre*, or a right of way, which is an easement, or right in nature of an easement, can no more be granted or conveyed for life or years without a deed than in fee simple (*h*). And in one

(*f*) Co. Litt. 8 a.; *Heclins v. Shippam*, 3 B. & C. 221; Bac. Abr., Grant, E. *Fitzhove*, 8 Q. B. 757; *Mayfield v. Robinson*, 7 Q. B. 486; *Worsley v. South Devon Railway*, 20 L. J. (Q. B.) 254; 16 Q. B. 539; *Taplin v. Florence*, 20 L. J. (C. P.) 137; 10 C. B. 744; *Hewitt v. Isham*, 21 L. J. (Ex.) 35; 7 Ex. 77.

(*g*) Id. 2 Bl. Com. 310 ad 317; Shep. Touch. 228-230; Sugd. Vend. 125; *Rann v. Hughes*, 7 T. R. 350, n.

(*h*) *Wood v. Leadbitter*, 13 M. & W. 838; *Perry v.*

of the cases from which these principles are cited, a ticket of admission to the Grand Stand at Doncaster to see the races, issued by the steward, and for which the holder had paid a guinea, was held to convey to him no right to be there, and no remedy for having been put out. For the transfer, therefore, of incorporeal property, a deed is necessary.

For the same reasons, reversions or remainders cannot be granted, either for an estate of freehold, or for years without a deed (*i*). It further illustrates this rule and the grounds of it, that although incorporeal property cannot pass without deed, yet when appendant to property which does not require a deed for transferring it, the former may pass as annexed to the latter. As if A. be seised in fee of land to which common for cattle levant and couchant on such land is appurtenant, and A. makes feoffment of the land without deed, the common will pass as annexed to the land. But if a man seised of black acre and white acre convey by parol the former to B., with common for his cattle levant and couchant thereon in white acre, this will not convey the common without a deed (*k*). It is obvious that the common is appurtenant in one instance and not in the other. And, although a parson cannot grant his tithes for life or years, without deed, yet as he may at Common Law grant his rectory by parol,

(*i*) Shep. Touch. 230 ; Bac. dorff's Abr. 635.
 Abr., Grant, E. See 7 Peters- (*k*) Bac. Abr., Grant, E.

if he does so grant it, the tithes will pass without deed, as annexed to the rectory.

As a general rule, chattels real and personal of tangible or corporeal natures may at common law be granted without deed (*l*). And, although an estate of inheritance or freehold cannot be granted upon condition without deed (*m*), yet a chattel, real or personal, may be so made or granted by mere parol (*n*).

Patents for inventions which have now become a very important class of property, are by the Stat. 15 & 16 Vict. c. 83, assignable only by deed or will (*o*), and such assignment must be perfected by entry on the register of proprietors (*p*). But it is remarkable, and worthy of attention, that a copyright in any book within the Copyright Act, 5 & 6 Vict. c. 45, may be assigned by entry in the Book of Registry kept at Stationers' Hall of the assignment, and such assignment so entered is of the same force and effect as if it had been made by deed, sec. 13. A deed is rendered necessary by the Merchant Shipping Act, 1854, to make a valid transfer of a registered ship, or any share therein (*q*). Patents.
Ship.

(*l*) Shep. Touch. 231; Bac. Abr., Grant, E.

(*m*) Litt. 365.

(*n*) Id. *Reeves v. Capper*, 5 N. C. 136; *Flory v. Denny*, 21 L. J. (Ex.) 223; 7 Ex. 581.

(*o*) 15 & 16 Vict., c. 83, Form of Letters Patent.

(*p*) See Norman on Letters Patent, c. 16, s. 8.

(*q*) 17 & 18 Vict., c. 104, s. 55, sch. E.

Agent.

A deed is also necessary for authorising an agent to execute a deed for another (*r*). It is also, as will hereafter appear, necessary to a grant by a corporation.

Corporation.

Chattels.

There is also a great difference between the effect of a gift of chattels by mere word of mouth, and a gift of chattels by deed. In the former case, after the gift and before something has been done or said by the donee to show his acceptance of the thing given, the gift is revocable (*s*). But if the gift be by deed it vests in the donee upon the execution of the deed, and is irrevocable by the donor until it is actually disclaimed by the donee. After such execution, and before such disclaimer, the estate is in the donee without any actual delivery of the chattel given (*t*).

8 & 9 Vict.
c. 106.

Finally, it is necessary to bear in mind that the common law has been much altered in these respects by statute 8 & 9 Vict. c. 106, s. 3, by which statute feoffments, partitions, exchanges, leases required by law to be in writing, assignments of chattel interests, and surrenders in writing of all interests in tenements and hereditaments not being such as might have been created without writing, made after the 1st of October, 1845, with some exceptions

(*r*) *Steiglitz v. Egginton*, 1 Holt, N. P. C. 141; *Harrison v. Jackson*, 7 T. R. 207.

(*s*) 2 Rolle's Abr. 62; 14 Vin. Abr. 123.

(*t*) *Perkins' Grant*, 57. Com. Dig. Biens. 52; 2 M. & G. 691, note a; *Barton v. Gainer*, 27 L. J. (Ex.) 390; 3 H. & N. 387.

unimportant for our present purpose, shall be void at law unless made by deed. But the former learning upon these heads is still of great practical importance.

Lastly, with regard to the remedy upon a contract by deed: wherever a promise is made by deed, the performance may be enforced by an action of covenant; and, if a liquidated debt be secured by it, by an action of debt. These remedies must be pursued within twenty years, except in cases of disability by reason of infancy, coverture, lunacy, or absence beyond seas, such being the period fixed by 3 & 4 Wm. IV., c. 42, s. 3, which, being later in date, though passed in the same session with 3 & 4 Wm. IV., c. 27, is held to have superseded some inconsistent provisions contained in that statute (*u*). The Common Law Procedure Act, 1854, 17 & 18 Vict., c. 125, ss. 68 to 86, also gives some remedies in the nature of specific performance and prevention, by means of the writs of mandamus and injunction, which will probably be found of great use in securing the performance of contracts.

Remedies on
contracts by
deed.

Having thus touched on the general division of Contracts into those of Record by Deed, and by Simple Contract, and explained the nature of a deed, and the formalities attending its execution—having pointed out the distinction between the

(*u*) See *Strachan v. Thomas*, 12 A. & E. 536; *Paget v. Foley*, 2 Bing. N. C. 679.

absolute delivery of a deed and the conditional one of an escrow, the distinction between a deed poll and indenture, the peculiar privileges of a contract by deed, whether in respect of the consideration, the estoppel it creates, the means by which its obligation is determined, or the rights which it confers upon a creditor against his debtor's assets,—having pointed out the remedy by which its non-performance is complained of in a Court of law, and the time of limitation within which that remedy is to be pursued, it remains to point out in a similar manner the peculiarities attending Simple Contracts. This will be done in the next Lecture.

LECTURE II.

THE NATURE OF SIMPLE CONTRACTS;—OF WRITTEN
CONTRACTS;—THE STATUTE OF FRAUDS.

I NOW arrive at the class denominated *Simple Contracts*, which comprises all of a degree inferior to deeds, whether they be verbal or written. For though, as I shall presently explain to you, there is, in many respects, a distinction between Simple Contracts which are *written* and those which are *verbal* merely; yet the law of England in respect of the qualities which they have in common, includes them in one class, and denominates them all by the same term *Simple Contracts*. Simple contracts.

All simple contracts are inferior in efficacy to contracts under seal. Thus, they do not create an estoppel. They are capable of being put an end to without the solemnity of a deed. They form no ground of action against the heir or devisee, even though he be expressly named in them; and they require a consideration to support and give them validity, though, as I shall have occasion to explain in a future Lecture, there is one case, even among simple contracts, in which the consideration need not be shown, but is presumed to exist unless its In what inferior to deeds.

existence can be disproved. In these respects, all simple contracts are like one another.

Proof of
written con-
tracts.

But although verbal contracts and contracts in writing, but not under seal, are both included in the class of simple contracts, there are two great differences between them which it is necessary to explain at some length to you. The first concerns *the mode in which they are to be proved*. The second is that there are several matters which although they may be the subjects of simple contracts, cannot be contracted for without a writing (*a*). The first results from an inflexible rule of the law of evidence, that, when a contract is reduced into writing, it shall be proved by the writing, and by that only. For the written instrument, being constituted by the parties the expositor of their intentions, must, in order to effectuate that object, be the only instrument of evidence to prove their intentions. If, instead of being constituted by the parties the expositor of their intentions, a written instrument is constituted such by a positive rule of law, the same result must follow. Thus, when, by the Statute of Frauds, operation is given to a written instrument exclusively, the object of the statute would be defeated if parol evidence were admitted in lieu of the required writing, or in any way to alter it. To admit oral evidence as a substitute for instruments to which, by reason of their superior

(*a*) See p. 72.

authenticity and permanent qualities, an exclusive authority is given by the parties, would be to substitute the inferior for the superior degree of evidence, conjecture for fact, and presumption for the highest degree of legal authority. It would substitute loose recollection and uncertainty of memory for the most sure and faithful memorials which human ingenuity can devise or the law adopt (b); and would introduce a dangerous laxity and uncertainty as to all titles to property, which, instead of depending on certain fixed and unalterable memorials, would then be made to depend upon the frail memories of witnesses, and be perpetually liable to be impeached by fraudulent and corrupt practices. And where the law, for reasons of policy, requires written evidence, to admit oral testimony in its place would be to subvert the rule itself (c).

In applying this rule, therefore, no contemporaneous verbal expressions must be allowed to be engrafted upon the writing, so as to alter it by adding to, or taking away, from its import. You will find this principle laid down and enlarged upon in all the treatises on Evidence; see, for instance, *Starkie on Evid.* (4th ed. 648), where you will find the application of this rule very fully discussed. Indeed, there is hardly any branch of the law

(b) *Countess Rutland's case*, 5 Rep. 26. Stark. Evid. 4th ed. 651. (c) Id. 649. *Marshall v. Lynn*, 4 M. & W. 109.

which has given rise to so much subtle and anxious discussion and inquiry as this single rule of the law of Evidence. The late Vice-Chancellor, Sir *James Wigram*, has, in one of the ablest treatises existing in our law libraries, discussed its application to the single head of Devises.

You must, therefore, take care not to be misled as to the meaning of the rule; for, as may be expected, it involves nice distinctions. It would be impossible to do complete justice to these within the limits of this work; still, however, I think that I can point out their nature, so far as to give a notion of the sort of questions which are likely to arise, sufficient to prevent surprise by such questions, should they occur in practice.

Written contracts cannot be varied by parol evidence.

Now, the rule itself, as I have said, is, that no *parol*, that is *verbal*, evidence of what took place at the time of making a written contract is admissible for the purpose of *contradicting* or *altering* it; for instance, if *A.* contract in writing with *B.*, to deliver him 100 quarters of wheat within three months, at so much per quarter, no evidence would be admissible to show that it was agreed, at the time, that the wheat should be delivered only in case of the arrival of a ship which the vendor expected from Odessa with wheat on board; for that would be, by parol evidence, to turn an absolute written contract into a conditional one (*d*). So,

(*d*) See *Wallis v. Littell*, 31 L. J. (C. P.) 100.

if a promissory note or bill of exchange (which, not being under seal, is, you must be aware, a simple contract,) were made payable on one day, verbal evidence could not be admitted to show that it was meant to be payable upon another (e). So also where a written contract for the sale of goods did not specify any time for delivering them, the vendor was not allowed to give evidence that at the time of forming the contract it was made a condition of the sale, that the purchaser should immediately take them away (f). In like manner, where the written contract mentioned no time for payment, and where, consequently, the law implies the term of immediate payment, the Court held this to be the meaning of the written contract, and would not allow it to be proved that by the usual course of dealing between the parties, six months' credit was to be given (g). A defendant bargained by parol with the plaintiff, who was a baker, to supply him with flour of the same quality as that which he supplied to another customer, one M.; and the defendant sent the plaintiff as a note of the contract the following memorandum, signed by

(e) *Free v. Hawkins*, 8 Taunt. 92; *Hoare v. Graham*, 3 Camp. 57; *Hogg v. Snaith*, 1 Taunt. 347; *Moseley v. Hanford*, 10 B. & C. 729; *Foster v. Jolly*, 1 C. M. & R. 703; *Adams v. Wordley*, 1 M. & W. 374; *Brown v. Langley*, 4 M. & G. 466; *Besant v. Cross*, 20 L. J. (C. P.) 173; 10 C. B. 895.

(f) *Greaves v. Ashlin*, 3 Camp. 426.

(g) *Ford v. Yates*, 2 M. & G. 549. See per *Parke, B.*, 2 Ex. 99.

himself: "Sold to Mr. H. (the plaintiff) 25 sacks whites X S, at 68s. per sack net," omitting to state that the quality should be the same as that supplied to M.; and afterwards delivered flour corresponding to the note. The flour being inferior to that supplied to M., the plaintiff sued him for his breach of contract. But the Court of Common Pleas considered that parol evidence was not admissible to show that the plaintiff had bargained for other flour than that mentioned in the written note. The contract, said *Maule, J.*, whatever it was, was reduced into writing, and when that is so we must look at the writing and at nothing else, even though the terms previously agreed upon by the contracting parties be omitted from it. For the same reason, when a rule of Court has been made, it has been held that the rule alone can be looked to, and its meaning cannot be modified by what took place in court previously to its being made (*h*). And as verbal evidence of what took place at the time of making a written contract cannot be given to show that the meaning of it is different from what its words import, so neither can evidence that the parties *have acted* upon the supposition of its being different have that effect (*i*).

(*h*) *Harnor v. Groves*, 24 *Browne*, 30 L. J. (C. P.) 106.
 L. J. (C. P.) 53; 15 C. B. (*i*) *Giraud v. Richmond*, 15
 667; *Edwards v. Cooper*, 3 L. J. (C. P.) 180; 2 C. B.
 C. & P. 277; *Holton v.* 835, S. C.

But, though it cannot be allowed to show that the meaning of a written contract was varied *at the time of making it*, by words merely spoken, there are some cases in which it might be shown that it was *subsequently* so varied. These are cases in which the contract, although written, is of a description which is not required by law to be reduced into writing at all. Thus if, in consideration of £50, I promise to go to York on the 1st day of January, and that contract be reduced to writing, verbal evidence would not be admissible to show that it was agreed, *at the same time*, that the contractee was to be at liberty, on payment of £10, to substitute Edinburgh for York ; but verbal evidence would be admissible to show that it was agreed *next day*, that, on payment of £10, he might, if he pleased, substitute Edinburgh for York ; for, as there is no rule of law which requires such a contract to be reduced into writing, it might have been made by words merely spoken, and you are therefore allowed to give parol evidence—not that the written contract did not contain the intention of the parties at the time of drawing it up—but that they *subsequently* altered a part of it by spoken words, and so, in fact, made a *new agreement* (k). This, you will observe, is no violation of the rule, or of the reason of it, which is that, what the parties have chosen to confide to a written

Where parol evidence applies to subsequent variation of contract.

(k) Judgment of Court in *Goss v. Lord Nugent*, 3 P

document, shall not be proved or varied by a kind of evidence to which, as appears by their conduct, they did not choose to trust. But though this may be done where the contract is one which the law does not require to be in writing, yet a little consideration will show that where a writing is necessary, it cannot be allowed ; for, if it were, the effect of the verbal evidence would be to turn a contract which the law requires to be in writing into one partly in writing and partly in words. Therefore, in *Goss v. Lord Nugent* (l), it was decided that a contract for the purchase of land (which, by the Statute of Frauds, is required to be written) cannot be altered by a verbal arrangement, although made subsequently. The same reason would obviously apply to a contract for the sale of goods, or to any contract required by law to be in writing (m). “Such an agreement (i.e., the one supposed to be altered by parol) must,” said the Lord Chancellor, (in *Emmet v. Dewhirst*,) “be proved ; it cannot be by parol, therefore it cannot be proved at all” (n).

Patent and
latent
ambiguities.

Another celebrated distinction on this subject is, that in a written contract, or, indeed, in any other written instrument, if there be a *patent ambiguity*, it never is allowed to be explained by verbal

(l) 5 B. & Ad. 58 ; *Stovell Lynn*, 6 M. & W. 109.
v. Robinson, 3 B. N. C. 928. (n) *Emmet v. Dewhirst*, 21
 (m) *Stead v. Dunbar*, 10 L. J. (Ch.) 497 ; 3 M. & G.
 A. & E. 57 ; *Marshall v.* 587.

evidence, although a *latent ambiguity* is so (o). The meaning of the expressions *patent* and *latent* with reference to this subject is as follows :—

A *patent* ambiguity is one which appears on the face of the instrument itself, and renders it ambiguous and unintelligible : as if in a will there were a *blank* left for the devisee's name (*p*) ; or as if, in the body of a bill of exchange, it appeared to have been drawn for £200, and in the margin the figures usually put there expressed that it was drawn for £245 (*q*). In this latter instance the Court refused to admit evidence that the words “and forty-five” had been omitted by mistake.

What is a
patent
ambiguity.

A *latent* ambiguity is where the instrument itself is on the face of it intelligible enough, but a difficulty arises in ascertaining the identity of the subject-matter to which it applies, as if a devise were to *John Smith*, without further description. In that case the devise would be intelligible enough on the face of it, and if there were only one John Smith in being, no difficulty could arise. But as there are several thousands, it would be impossible to tell which of them was meant without admitting verbal evidence, which would accordingly be admitted. This would be what is called a latent ambiguity, because it would not appear on the face

What is a
latent
ambiguity.

(o) Bacon's Maxims, reg. C. C. 311 ; *Clayton v. Lord*
23. See *Dodd v. Burchall*, *Nugent*, 13 M. & W. 200.
31 L. J. (Ex.) 364. (q) *Saunderson v. Piper*, 5
(p) *Hunt v. Hort*, 3 Bro. Bing. N. C. 425.

of the instrument, but would lie hid till evidence had been produced, showing that there were a great number of persons corresponding in name with the devisee.

The force and application of this rule, and the distinction between these two kinds of ambiguity, are so happily expressed and illustrated in a judgment of the Court of Exchequer, in the case of *Doe dem. Hiscocks v. Hiscocks* (r), that, although that judgment was given on the case of a will, it will be very useful to introduce a portion of it here. "The object in all cases," said the Court, "is to discover the intention of the testator. The first and most obvious mode of doing this is, to read his will as he has written it, and collect his intention from his words. But, as his words refer to facts and circumstances respecting his property and his family, and others whom he names or describes in his will, it is evident that the meaning and application of his words cannot be ascertained without evidence of all those facts and circumstances (s). To understand the meaning of any writer, we must first be apprised of the persons and circumstances that are the subjects of his allusions or statements, and if these are not fully disclosed in his work, we must look for illustration to the history of the times in which

(r) 5 M. & W. 363. See *Rouse*, 5 C. B. 422.
Doe d. Allen v. Allen, 12 A. (s) See *Burgess v. Wickham*,
& E. 451; *Doe d. Gains v.* 31 L. J. (Q. B.) 17.

he wrote, and to the works of contemporaneous authors. All the facts and circumstances, therefore, respecting persons or property to which the will relates, are undoubtedly legitimate and often necessary evidence, to enable us to understand the meaning and application of his words. Again, the testator may have habitually called certain persons or things by peculiar names, by which they were not commonly known. If these names should occur in his will, they could only be explained and construed by the aid of evidence, to show the sense in which he used them, in like manner as if his will were written in cypher or in a foreign language. The habits of the testator in these particulars must be receivable as evidence, to explain the meaning of his will.

“But there is another mode of obtaining the intention of the testator, which is, by evidence of his declarations, of the instructions given for his will, and other circumstances of the like nature, which are not adduced for explaining the words or meaning of his will, but either to supply some deficiency or remove some obscurity, or to give some effect to expressions that are unmeaning or ambiguous. Now there is but one case in which it appears to us that this sort of evidence of intention can properly be admitted, and that is where the meaning of the testator's words is neither ambiguous nor obscure, and where the devise is on the face of it perfect and intelligible, but, from

some of the circumstances admitted in proof, an ambiguity arises as to which of the two or more things, or which of the two or more persons (each answering the words in his will), the testator intended to express. Thus, if a testator devise his manor of S. to A. B., and has two manors, of North S. and South S., it being clear he means to devise one only, whereas both are equally denoted by the words he has used ; in that case there is what Lord Bacon calls ‘an equivocation,’ the words equally apply to either manor ; and evidence of previous intention may be received to solve this latent ambiguity, for the intention shows what he meant to do ; and when you know that, you immediately perceive that he has done it by the general words he has used, which, in their ordinary sense, may properly bear that construction. It appears to us, that, in all other cases, parol evidence of what was the testator’s intention ought to be excluded, upon this plain ground, that his will ought to be made in writing ; and if his intention cannot be made to appear by the writing explained by circumstances, there is no will.”

A latent ambiguity, therefore, is where, on attempting to execute the contract, it is found that the words used apply equally to two or more different things, and then evidence is admissible to show which of them was the thing intended. Thus, where previously to a contract for the purchase of wool being reduced into writing, a conversation

had taken place between the buyer and the seller, in which the latter had said that he had a quantity of wool partly of his own clip and partly bought of other persons, and by the contract when reduced to writing, it appeared that the defendant purchased of the plaintiff a certain quantity of wool described therein as "your wool," it was considered that evidence of the conversation was admissible to show that by "your wool" the parties meant the wool which at the time of the conversation was in the seller's possession (*t*). "The subject-matter of the contract," said Lord *Campbell*, C.J., "was 'your wool,' and I am of opinion that when there is a contract for the sale of a specific subject-matter, parol evidence may be received to show what the nature of that subject-matter was, and that in effect may be by proving what was in the knowledge of the parties at the time of the contract being made. Now, in order to show that, it was proposed to prove the conversation between the plaintiff and the defendant, in which it was mentioned that the plaintiff had wool of his own, and also that he had contracted for the purchase of other wool. There was knowledge in both parties of what the subject-matter was. There was an offer to buy 'your wool'; that was the specific subject-matter which was to be purchased. Then is there any difficulty in admitting what passed at that conversation? I

(*t*) *Macdonald v. Long*- 20 L. J. (Q. B.) 256; *S. C.* in *bottom*, 28 L. J. (Q. B.) 293; Exch. Ch.

think that there is none. It is no part of the contract, and is not adding to or varying a written contract, but it is evidence which enables us to say what the contract referred to. It seems that there was a reference to the wool which was in the possession of the defendant, partly obtained from his own flocks, and partly that which he had purchased from other people."

For the same reason, when the terms of a written contract signed by the defendant were, "in consideration of my entering on your employ at such a salary, &c.," not specifying what the employment was, evidence that the defendant being in the plaintiff's service, a vacancy in another department of his business occurred, which the defendant undertook to fill, was admitted to show that it was this vacancy to which the terms of the written contract referred (*u*).

Usage and
customary
incidents.

There is one exception, indeed, engrafted on the rule which forbids the reception of parol evidence for the purpose of qualifying the sense of a written contract ; it occurs where parties have contracted with reference to some known and established usage. In such cases the usage is sometimes allowed to be engrafted on the contract, in addition to the express written terms. When they have so contracted, the reference in their minds to the usage is similar to that reference which exists in all men's minds (when making a contract) to the general law.

(*u*) *Mumford v. Gething*, 29 L. J. (C. P.) 105.

In the latter case they intend that where their contract is silent, their rights shall be those which the general law annexes to the stipulations which they have expressed; and in the former they intend that the rules which the usage of the place or trade annexes, shall regulate their rights in those particulars in which their agreement is silent. In both cases they can exclude the general law or the usage by their stipulations, and, in both, are liable to the general law or to the usage where their contract does not exclude their operation (*x*), by showing, expressly or impliedly, that they did not intend to be bound by it. The notoriety of the custom makes it part of the contract. The admission of evidence of custom in the interpretation of contracts, has often been objected to; but it seems difficult to resist the reasoning in the following sentences taken from *Archbishop Whateley's Edition of Paley's Moral Philosophy* (*y*): "And here, once for all, I would observe, that innumerable questions of this sort are determined solely by *custom*; not that custom possesses any proper authority to alter or ascertain the nature of right and wrong, but because the contracting parties are presumed to include in their stipulation all the conditions which custom has annexed to contracts of the same sort, and when the usage is notorious, and no exception made to it, this pre-

(*x*) *Senior v. Armitage*, 1 Warren, 1 M. & W. 466,
Holt, N. P. 197; *Hutton v.* (*y*) Page 127.

sumption is generally agreeable to the fact. The treatment of servants, for example, as to diet, discipline, and accommodation, the kind and quantity of work to be required of them, the intermission, liberty, and indulgence to be allowed them, must be determined in a great measure by custom; for where the contract involves so many particulars, the contracting parties express a few, perhaps, of the principal, and by mutual understanding refer the rest to the known custom of the country in like cases." The custom may be so universally followed in the place or trade in which the contract was made, that no one can be supposed to have contracted without looking upon it as part of his contract (z).

Upon such reasonings it was held, in the leading case of *Wigglesworth v. Dallison* (a), where a lease of land under seal was made for a fixed term of years, that a custom of the parish in which the land lay, that the tenant should, after the expiration of the term, have the way-going crop, was obligatory on the landlord; that custom not altering or contradicting the agreement in the case, but only superadding a right as consequential to the taking. Very similar to this was the equally leading case of *Hutton v. Warren* (b), where the plaintiff had held under a lease by deed which had

(z) *Queen v. Stoke-upon-Trent*, 2 Q. B. 303. L. C. 520, 5th ed.

(b) 1 M. & W. 466.

(a) Dougl. 201; 1 Smith,

expired, but, continuing to occupy without further stipulation, was, according to law, bound by the terms of the expired lease. There was a covenant in the lease, that he would consume on the farm three-quarters of the hay and straw raised thereon, and on certain other property not comprised in the lease, and would leave for the landlord such of the manure thence arising as was not used upon the farm, receiving a reasonable price for it. There was also a custom of the neighbourhood that the tenant of a farm should receive from the landlord or incoming tenant a reasonable allowance for seed and labour bestowed on the arable land in the last year of his tenancy, and should leave the manure for the landlord if he would purchase it. The Court considered that in this case the only difference material to the question between the covenant and the custom was that the covenant obliged the tenant to spend on the farm more than its own produce upon being paid for it, which was not incompatible with the custom, but virtually left it in its full operation.

But the Courts never admit evidence of an *usage* incompatible with the written contract; for, in the words of Mr. Baron *Alderson*, in the case of *Clarke v. Roystone* (c), “Where a stipulation is inconsistent with the custom of the country, the contract must prevail and the custom

(c) 13 M. & W. 752.

of the country must be excluded." In these cases it appears to be simply a question whether the words of the contract themselves sufficiently disclose the full import of the contract: if so, no custom can vary it, and no evidence of custom is admissible.

But a tenant may avail himself of a local custom to take an away-going crop after the expiration of his term under a lease; although the terms of *holding* during the continuance of it are inconsistent with the custom, if it contain no stipulations as to the mode of *quitting* (d). For it is evident that the rights of the landlord and tenant may be governed by the terms of the agreement during the tenancy, and by the terms of the custom immediately afterwards.

The following example relative to annexing a custom to the stipulations in a lease is also well worth observing. A lease for seven years contained a clause "that the tenant should, during the term, consume with stock on the farm all the hay, straw, and clover grown thereon, which manure should be used on the farm; and should, in the last year of the term, leave not less than fourteen acres of land summer fallowed, manured with a full quantity of manure, and sown in good time for sheep feed." But there was a custom in the parish that an outgoing tenant who, on coming in, had paid for the

(d) *Holding v. Piggott*, 7 Bing. 465.

straw, was entitled to be paid for it on going out, which payment on coming in had in fact been made by the plaintiff. It was held that the provision in the lease did not prescribe anything to be done with the straw on quitting, and that the custom bound the outgoing tenant to leave the straw, and entitled him to be paid for it (*e*). But in a case where, by the custom of the country, the outgoing tenant was entitled to an allowance for foldage from the incoming tenant, but the lease under which the former had held specified certain payments to be made by the incoming to the outgoing tenant at the time of quitting the premises, among which there was not included any payment for foldage; the Court considered that the terms of the lease excluded the custom, and that the outgoing tenant was not entitled to any allowance in respect of foldage (*f*).

Parol evidence is admissible to annex customary incidents to written contracts, not only contracts between landlord and tenant, but commercial contracts, and contracts in other transactions of life in which known usages have been established. Customary incidents.

Thus, a person employing a broker on the Stock Exchange impliedly gives him power to act in accordance with the rules there established, although he makes no mention of them in his instructions,

(*e*) *Muncey v. Dennis*, 26 B. & A. 746; see *Roberts v. L. J. (Ex.)* 66; 1 H. & N. 216. *Barker*, 1 C. & M. 808.

(*f*) *Webb v. Plummer*, 2

and although he may even be ignorant of them (*g*). But of course the rules by which he so gives the broker authority to act, must be rules existing when the contract is made, not such as are made after it is completed (*h*). Thus also an agreement in writing to serve from 11th November, 1815, to 11th November, 1817, at certain wages, "in which the servants engage to lose no time on our account, to do our work well and behave themselves in every respect as good servants," was considered consistent with a usage in the particular trade for servants, under similar contracts, to have certain holidays and Sundays to themselves (*i*).

In another instance there was an agreement in writing between a master and a servant in the woollen and mohair cloth manufacture, that the plaintiff should serve the defendant therein at £150 a-year, provided that if, at the end of the year, the defendant had found that the plaintiff had done sufficient business to justify him in making up his salary to £180, he would make him a donation of £30. A general custom in the trade was proved that either party might determine the service upon giving the other a month's notice ; and the question

(*g*) *Sutton v. Tatham*, 10 C. B. N. S.) 175 ; *Smith v. A. & E.* 27. See *Bayliffe v. Lindo*, 27 L. J. (C. P.) 335. *Butterworth*, 1 Exch. 425 ; (*h*) *Westropp v. Solomon*, 8 *Stewart v. Cauty*, 8 M. & W. C. B. 345. 160 ; *Bayley v. Wilkins*, 7 (*i*) *R. v. Stockton-upon-Trent*, 5 Q. B. 303. C. B. 886 ; *Taylor v. Stray*, 26 L. J. (C. P.) 185, 287 ; 2

was, whether the terms of the agreement were such as to exclude the custom. The Court clearly thought that there was not anything in it to have that effect. *Crowder, J.*, observed that the agreement did not contain any stipulation as to the time of quitting the service, or as to the term of dismissal. If it had contained such stipulations, then, according to the authorities, the custom would have been excluded, for the question in all these cases is, whether the incident which it is sought to import into the contract is consistent with the terms of the written instrument (*k*).

For the same reason, in a case where it was proved that in the tobacco trade whenever a sale of tobacco takes place, and the written contract of sale contains no stipulation on the subject of samples, but samples are actually delivered, a usage prevails to consider the vendor as agreeing that the bulk shall correspond with the sample ; and the question in the case was, whether the usage was excluded by implication ; the Court of Exchequer decided that the usage might be proved, annexing thereby an additional term to the written contract not inconsistent with it (*l*). One more instance of a mercantile contract to which, although in writing, a customary usage has been annexed, will suffice. In a late instance, a bill of lading provided that goods

(*k*) *Parker v. Ibbetson*, 27 L. J. (C. P.) 236. (*l*) *Syers v. Jonas*, 2 Ex. 111.

should be delivered to the consignee or his assigns at Liverpool, he or they paying freight for the same, $\frac{5}{8}$ of a penny per lb., with primage and average accustomed. The shipowner sued the indorsee of the bill of lading, who had accepted the goods, to recover the freight and primage, when the latter was allowed to prove a custom at Liverpool by which he was entitled to a deduction of three months' discount from the freight (*m*). "In all contracts" (said *Coleridge*, J., delivering the judgment of the Court), "as to the subject-matter of which a known usage prevails, parties are found to proceed upon the tacit assumption of these usages. They commonly reduce into writing the special particulars of their agreement, but omit to specify these known usages, which are included, however (as of course), by mutual understanding. Evidence, therefore, of such usages is receivable. The contract in truth is partly express and in writing, partly implied or understood and unwritten. But in these cases a restriction is established on the soundest principle, that the evidence received must not be of a particular which is repugnant to or inconsistent with the written contract. Merely that it varies the writing is not enough to exclude the evidence, for it is impossible to add any material incident without altering its effect more or less.

(*m*) *Brown v. Byrne*, 23 L. J. (Q. B.) 313 ; 3 E. & B. 703.

The following are instances in which the usage has been held inconsistent with the contract :—

Where one carried on business as a tallow merchant, through an agent who always used his own name, but was universally known to represent the merchant, evidence of a custom in the tallow trade to reject on such contracts the principal, and to look to the broker alone for the fulfilment of the contract, was held inadmissible as being inconsistent with it (*n*). And again, where in a policy of assurance it was expressed that the insurance on the ship should continue until she was moored twenty-four hours, and on the goods till safely landed, it was held that a usage that the risk on the goods as well as on the ship expired in twenty-four hours was inadmissible (*o*).

Upon the same ground, where an attorney entered into a written contract whereby he agreed to take into partnership in the business of an attorney, a person who had not at that time been admitted, no time being fixed by the writing for the commencement of the partnership, it was decided that (no time being expressly appointed) the partnership commenced from the date of the agreement; and that parol evidence could not be received to show that the agreement was not to take effect until the intended partner should be duly admitted, for such

(*n*) *Trueman v. Loder*, 11 *Littledale*, 6 A. & E. 486.
A. & E. 589; *Magee v. Atkinson*, 2 M. & W. 440; *Jones v.*
(*o*) *Parkinson v. Collier*,
Park. on Ins. 47.

evidence would make the agreement different from that which it purported to be, namely, an agreement for a present partnership (*p*).

Terms used
by a class of
persons.

Moreover, where terms are used which are known and understood by a particular class of persons in a certain special and peculiar sense, evidence to that effect is admissible for the purpose of applying the instrument to its proper subject-matter; and the case seems to fall within the same consideration as if the parties, in framing their contracts, had made use of a foreign language, which the Courts are not bound to understand. Thus, where by a charter-party, a vessel with a cargo of coals to Algiers was to be unloaded at a certain rate per day, and if detained longer the charterer was to pay so much per day from the time of the vessel being ready to unload and *in turn to deliver*, evidence was admitted to show, that, in the port of Algiers, these words had acquired a peculiar meaning (*q*). And where one of the terms of a charter-party was that the vessel should proceed to Newcastle and there be ready "in regular turns of loading," it was decided that the question what was loading in a reasonable time ought not to be decided without reference to the usage of the port in respect of loading, a custom in this respect having been proved to exist (*r*).

(*p*) *Williams v. Jones*, 5 C. B. 412.
B. & C. 108.

(*r*) *Leideman v. Schultz*, 23

(*q*) *Robertson v. Jackson*, 2 L. J. (C. P.) 17; 14 C. B. 38;

Upon this principle evidence has been admitted to show that in mercantile contracts the Gulf of Finland is considered as within the Baltic, although the two seas are considered separate and distinct by geographers (*s*). So evidence is admissible to prove that in similar contracts the Mauritius is treated as an Indian island, although treated by geographers as African (*t*). Parol evidence has been received to show the meaning of the word 'level' in a lease of coal mines (*u*); that the word London has a colloquial sense other than the City (*x*); and that, by the usage of a particular district, 1000, applied in a lease to rabbits on the land, meant 1200 (*y*). In like manner, where an auctioneer was employed to sell land under a written contract that he should be paid 1 per cent. commission, but if the estate were not sold within two months after the day of auction, then he should be paid $\frac{1}{2}$ per cent. only; although this time by itself meant two months of four weeks each, yet evidence of those words being used in the auction trade in the sense of calendar months is admissible, and the jury may find that they were so used in this contract (*z*). Where a

see *Hudson v. Clementson*, 25 A. & E. 302.

L. J. (C. P.) 234; 18 C. B. 213. (*x*) *Mallan v. May*, 13 M. & W. 511.

(*s*) *Udhe v. Walters*, 3 Camp. 16. (*y*) *Smith v. Wilson*, 3 B. & Ad. 728.

(*t*) *Robertson v. Money*, Ry. & Mood. 75. (*z*) *Simpson v. Margitson*, 11 Q. B. 23.

(*u*) *Clayton v. Gregson*, 5

contract was made to sell mess pork of Scott & Co., evidence was admitted to show that in the market it was understood to mean manufactured by Scott & Co. (*a*); and where a corn-merchant abroad sent instructions to his corn factor in London to sell oats on his account, evidence was admitted to show that by the custom of the London corn trade a factor acting under such instructions was warranted in selling in his own name (*b*). In another instance, a memorandum for a wager on a steeple-chase described the race as four miles across a country, and evidence was received to explain that across a country meant that the riders were to go over all obstructions and not to avail themselves of an open gate (*c*). In another case, an agreement in writing was made by an actress to perform at defendant's theatre, who agreed to engage her for three years, and to pay her so much a week. In an action for the salary the defendant was allowed to prove that according to uniform usage in the theatrical profession the actress was to be paid during the theatrical season only—that is, while the theatre was open (*d*). Upon the same principle, where the defendant contracted by a charter-party to load in

(*a*) *Powell v. Horton*, 2 Bing. N. C. 668.

(*b*) *Johnston v. Usborne*, 11 A. & E. 549; *Graves v. Legg*, 26 L. J. (Ex.) 316; 11 Ex. 642.

(*c*) *Evans v. Pratt*, 3 M. & G. 759.

(*d*) *Grant v. Maddox*, 15 M. & W. 737; *Myers v. Sarl*, 30 L. J. (Q. B.) 9.

Trinidad a full and complete cargo of sugar, molasses, or other lawful produce, and he did load as many *puncheons* of sugar and molasses as the ship would hold, he was held to have fulfilled his contract, because, by the custom of Trinidad, a full and complete cargo of sugar and molasses meant a cargo of those goods packed in puncheons (e). So it has been decided that a usage and custom that underwriters are not, under the ordinary form of policy, liable to general average on account of throwing overboard, and consequent loss of, any timber stowed on deck, is not inconsistent with the terms of such policy, although those terms have been always held to render the insurer liable for general average (f). And where mining shares were sold which specified the times of payment, but not the time of delivery, proof of a usage among brokers in mining shares, that on contracts for the sale and purchase of such shares, the delivery of them should take place concurrently with, and at the time agreed upon for payment, and that the purchaser was not at liberty to demand the delivery of them before the time of payment, was admitted (g).

But, as said by Lord *Lyndhurst*, C. B., in

(e) *Cuthbert v. Cummings*,
(Ex. Ch.), 24 L. J. (Ex.) 310 ;
11 Ex. 405.

(f) *Miller v. Titherington*,
30 L. J. (Ex.) 217.

(g) *Field v. Lelean*, 30 L. J.
(Ex.) 168 in Ex. Ch. ; see
Spartali v. Benecke, 10 C. B.

Blacket v. Royal Exchange Insurance Company, although “usage may be admissible to explain what is doubtful, it is never admitted to contradict what is plain.” In this case a policy of insurance in usual form upon the ship furniture and apparel generally was sought to be qualified to the exclusion of a boat slung on the quarter by proving a usage at Lloyd’s to that effect. It is obvious that this usage ought to be rejected, as it was not to explain the policy or to introduce matter upon which it was silent, but was in direct variance with the words of the policy, and in plain opposition to the language it used (*h*). A contract was made with a ship-owner by a broker to have a full cargo for the ship, the rates of freight for which would average 40s. a ton, and at least nine cabin passengers, passage money to average £75. The contract was fulfilled as to the cabin passengers, but the average rate of freight for the goods put on board was only 32s. a ton ; but several steerage passengers were shipped whose passage money made up the average earnings of the ship to 40s. a ton. Evidence that the words cargo and freight in the voyage the ship was engaged in would include steerage passengers, and the net profit arising from their passage money, was rejected (*i*). The object of extrinsic evidence in these cases is to explain terms and modes of

(*h*) 2 C. & J. 244. S. V. L. J. (Ex.) 217.
Myers v. Sarl, 30 L. J. (Q. B.) (*i*) *Lewis v. Marshall*, 7 M.
 9 ; *Miller v. Titherington*, 30 & G. 729.

expression which, although belonging to the English language, are not intelligible to all who understand it, but have acquired by usage a definite sense and meaning known amongst a particular class of persons, which can be well ascertained by means of the testimony of those who are conversant with the peculiar use of those terms. The witnesses for this purpose may be considered as the sworn interpreters of the language of commerce, art, or place in which the contract is written. But beyond this the principle does not extend. If plain and ordinary terms and expressions, to which an unequivocal meaning belongs, which is intelligible to all, are used, that plain sense and meaning ought not to be altered by mercantile understanding and usage. To allow such alteration would be to make it legal to say one thing and mean another, and would render a writing useless. Therefore parol evidence cannot be given to explain the meaning of the words "more or less" in a mercantile contract (*k*). And where a man contracts in his own name, evidence to excuse him from liability on the ground of a custom in Liverpool to send in broker's notes without disclosing the principal's name cannot be received; and *Alderson*, B., said the custom offered to be proved was a custom to violate the common law of England (*l*).

(*k*) *Cross v. Eglin*, 2 B. & Ad. 106; see *Moore v. Campbell*, 10 Ex. 323; 23 L. J. (Ex.) 310. (*l*) *Magee v. Atkinson*, 2 M. & W. 440; *Jones v. Littledale* 6 A. & E. 486.

It must be borne in mind, in the application of all these rules, that evidence of words being used in a certain sense, or that certain incidents are annexed by custom in certain places and amongst certain classes of persons, does not raise a conclusion of law that the contracting parties used the terms in those senses, or that the incident must necessarily be annexed, but is only evidence from which a jury may draw the conclusion that such was the meaning of the parties, or such the custom or usage (*m*). It must also be borne in mind that although, in the classes of cases mentioned, evidence of usage may be received to explain the written contract, yet, when the jury have decided on the meaning of the term, it is not for them but for the Court to put a construction upon the entire contract or document (*n*).

Unusual.

It must also be observed, before quitting this subject, although it may be deduced from the very terms of the rules of which we have been treating, that if the contract itself be unusual, evidence of the usage and custom of the trade in the course of which the unusual contract arose, ought not to be received to explain it (*o*).

Writings to which these rules apply must themselves constitute a contract.

It seems hardly necessary to say that before the

(*m*) *Clayton v. Gregson*, 5 A. & E. 302 ; *Smith v. Wilson*, 3 B. & Ad. 728.

(*n*) *Hutchinson v. Bowker*, 5 M. & W. 535 ; *Neilson v.*

Harford, 8 M. & W. 806.

(*o*) *Lewis v. Marshall*, 7 M. & G. 729 ; *Baxter v. Nurse*, 6 M. & G. 935.

application of these rules arises, the writing to which they are to be applied must really be a complete contract. But, in fact, considerable nicety of judgment has been found requisite upon the question whether in fact such contract does exist. Thus, where in a printed catalogue of articles to be sold by auction, a dressing case was described as having silver fittings, but at the sale the auctioneer stated, in the defendant's hearing, that the catalogue was incorrect in describing the fittings as silver, and it would be sold as having plated fittings, but no alteration was made in the catalogue: in an action for the price, it was proposed to prove what the auctioneer had said, but this was objected to, as attempting to vary by parol a written contract. But the Court considered the evidence to be unobjectionable, as in fact the auctioneer declined to sell by the printed particulars, and the contract of sale was altogether oral (*p*). And again, where goods were ordered by letter which did not mention any time for payment, and the goods were accordingly delivered with an invoice equally silent upon that point, it was decided that parol evidence might be given that it had been stipulated by the parties that certain credit should be given which was not expired. It will be observed that in this instance the letter and the invoice together did not form a contract, which, indeed, did not exist until the

(*p*) *Eden v. Blake*, 13 M. & W. 614.

goods were delivered, and consequently no rule was violated in receiving evidence that credit had been stipulated for (*q*). In order, said *Parke*, B., to render the defendant liable, there must be some evidence to take the case out of the Statute of Frauds. That liability arises from his receipt and acceptance of the goods, and if the plaintiff relied on that, the defendant would have been at liberty to show upon what terms he accepted them, by going into evidence of the conversation which took place at the time the order was given. But the plaintiff, instead of having recourse to the receipt and acceptance of the goods, put in the original order, which, without further explanation by parol, would be an *order* for payment on delivery. If, then, the plaintiff, instead of giving further evidence to explain this *order*, says that the defendant, by accepting the invoice which treats him as a purchaser, has had ample notice, and therefore there is an acceptance of the terms of the sale, it is competent for the defendant to show that he received the goods on the understanding that he bought them on credit. Under the Statute of Frauds, says *Alderson*, B., a contract to deliver goods without mentioning a time of payment means that the delivery and the payment shall be contemporaneous acts. Here the difficulty is of a different

(*q*) *Lockett v. Nicklin*, 2 Ex. 93 ; *Stones v. Dowler*, 29 L. J. (Ex.) 122.

nature. The documents in question are not a *contract*, but are writings out of which, with other things, a contract is to be made. The question then is, whether the defendant has not a right to adduce evidence not to contradict the written instruments, but to show the real contract of which the paper contains only one of the terms. In order to do that, the defendant must resort to the previous conversation (*r*). This rule has been well illustrated by a more recent case, in which a tradesman having in an invoice described himself as the seller of certain goods, it was attempted to sue him for a deficient delivery and improper packing of the goods, in consequence of which they became deteriorated on a voyage. He was, it was strongly argued, estopped by his invoice from saying that he was not the seller of the goods. But he was allowed to prove that the goods were bought by the plaintiffs from another person, and were included by the defendant in his invoice at the plaintiff's request, and for his convenience, for the purpose of enabling him to pay the price with greater facility. "No doubt," said the Chief Baron, "an invoice is in some cases very strong, and the strongest possible evidence of a contract. But here the actual contract was made before the invoice was contemplated, and therefore it would not alter the original terms of the contract. In many cases it

(*r*) *Id.* See *Jeffery v. Walton*, 1 Stark. 267.

may be part of the contract, but here the actual contract was a verbal one" (s).

The other point to which I alluded, as constituting an important practical distinction between simple contracts by mere words and simple contracts in writing (t) is, that there are several matters, which, although they are capable of becoming the subjects of *Simple Contract*, cannot, nevertheless, be contracted for without *writing*, so as to give either party a right of action on such contract.

By far the most important class of contracts subject to this observation are those falling within the enactments of the *Statute of Frauds*. And these are of such very constant recurrence in practice, that it will be right to devote some time to their consideration.

Statute of
Frauds.

The Statute of Frauds was passed in the twenty-ninth year of the reign of Charles II., and is the 3rd cap. of the statute-book of that year. It is said to have been the joint production of Sir *Matthew Hale*, Lord Keeper *Guilford*, and Sir *Leoline Jenkins*, an eminent civilian. The great Lord *Nottingham* used to say of it "*that every line was worth a subsidy*." Indeed, almost every word of it has been the subject of anxious discussion, resulting from the circumstance that the matters which its provisions regulate are those which are of everyday occur-

(s) *Holding v. Elliott*, 29 L. J. (Ex.) 134. (t) See p. 35.

rence in the course of our transactions with one another.

The chief object of passing the statute was, to prevent the facility to frauds, and the temptation to perjury, held out by the enforcement of obligations depending for their evidence upon the unassisted memory of witnesses. How great this temptation and facility in their own nature are, is obvious ; and, accordingly, the statute, in the 1st section, declares its own enactment to be “for the prevention of many fraudulent practices, which are commonly endeavoured to be upheld by perjury and subornation of perjury ;” and then it goes on to provide for various cases, in which it was apprehended that such practices were most likely to occur. The 1st of the twenty-five sections of which it consists is levelled at *parol* conveyances of land, and contains the celebrated enactment, of which you have doubtless often heard, that they shall create estates at will only. The 2nd section excepts from this enactment the case of leases not exceeding three years from the making thereof, and reserving two-thirds of the annual value as rent.

The 3rd section forbids *parol* assignments, grants, or surrenders ; the 5th is levelled at unattested devises ; the 6th at secret revocations of devises ; the 7th at *parol* declarations of trust ; the 19th and 20th against *nuncupative* wills of personalty ; and the 21st against verbal alterations in written wills.

But the two sections which mainly affect *contracts*, and which, consequently, are chiefly important to the subject of this Lecture, are the 4th and 17th.

Sect. 4.

The 4th section enacts—"That *no action* shall be brought to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or* sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

• *Sic.*

Heads of
sect. 4.

The contracts provided for by this section are, therefore, as you will have observed—

1st. *Promises* by an *executor* or *administrator* to answer damages out of his own estate.

2nd. *Promises* to answer for the *debt, default, or miscarriage of another person*.

3rd. *Agreements* made in consideration of *marriage*.

4th. *Contracts* or *sales of lands, tenements, or*

hereditaments, or any interest in or concerning them.

5th. Agreements *not to be performed within the space of a year* after the making thereof.

The latter part of the section applies equally to each of these five sorts of contract, which are equally prohibited from being made the subject-matter of action, unless the *agreement* or some note of *memorandum* of it shall be in writing, signed by the party to be charged or some person thereunto by him lawfully authorised.

Now, it has been decided,—*and the decision you will observe is equally applicable to each of the five descriptions of contract*,—that in consequence of the introduction of the word “*agreement*,” the *consideration* as well as the *promise* must appear in writing. That was settled by the well-known cases of *Wain v. Warlters* (u), *Saunders v. Wakefield* (x), and *Jenkins v. Reynolds* (y). For, the word *agreement*, comprehending what is to be done on both sides, comprehends of course the *consideration* for the promise as well as the *promise* itself. The judgment of Lord *Ellenborough*, in *Wain v. Warlters*, very clearly explains the reasons upon which this doctrine is founded.

Consideration
must be
stated.

“The clause in question in the Statute of Frauds,” says his Lordship, “has the word *agreement* (‘*unless*

(u) 5 East, 10.

(y) 3 B. & B. 14.

(x) 4 B. & Ald. 595.

the agreement upon which the action is brought, or some memorandum or note thereof, shall be in writing,' &c.) : and the question is, Whether that word is to be understood in the loose incorrect sense in which it may sometimes be used, as synonymous to promise or undertaking, or in its more proper and correct sense, as signifying a mutual contract, on consideration, between two or more parties ? The latter appears to me to be the legal construction of the word, to which we are bound to give its proper effect : the more so when it is considered by whom that statute is said to have been drawn, by Lord *Hale*, one of the greatest judges who ever sat in Westminster Hall, who was as competent to express as he was able to conceive the provisions best calculated for carrying into effect the purposes of that law. The person to be charged for the debt of another is to be charged, in the form of the proceeding against him, *upon his special promise* ; but without a legal *consideration* to sustain it, that promise would be *nudum pactum* as to him. The statute never meant to enforce any promise which was before invalid, merely because it was put in writing. The obligatory part is indeed the promise, which will account for the word promise being used in the first part of the clause ; but still, in order to charge the party making it, the statute proceeds to require that the *agreement* (by which must be understood the *agreement* in respect of which the promise was made) must be reduced

into writing. And indeed it seems necessary for effectuating the object of the statute, that the consideration should be set down in writing as well as the promise; for, otherwise, the consideration might be illegal, or the promise might have been made upon a condition precedent, which the party charged may not afterwards be able to prove, the omission of which would materially vary the promise, by turning that into an absolute promise which was only a conditional one; and then it would rest altogether on the conscience of the witness to assign another consideration in the one case, or to drop the condition in the other, and thus to introduce the very frauds and perjuries which it was the object of the Act to exclude, by requiring that the *agreement* should be reduced into writing, by which the consideration as well as the promise would be rendered certain" (z).

In a case, therefore, where a contract was made in writing between a bookseller and an author, which evidently was to endure for more than a year, and which contained stipulations to be performed by the bookseller, but none to be performed on the part of the author, either express or which could be made out by necessary implication; it was decided that an action could not be supported upon

(z) As to the consideration miscarriage of another, see 19 for any special promise to an- & 20 Vict. c. 97, s. 3, *post*, swer for the debt, default, or Guaranty.

this contract for want of any consideration appearing upon its face (*a*).

But this consideration need not appear in express terms ; it is sufficient, as will hereafter appear, that any person of ordinary capacity must infer from the perusal of the memorandum or note that such and no other was the consideration upon which the undertaking was given (*b*). It must appear in express terms, or by necessary implication (*c*).

All the terms must be expressed in the memorandum.

The same reasoning as that employed by Lord *Ellenborough* in *Wain v. Warlters*, clearly shows that all the terms of the agreement, as well as the consideration, must be expressed in the memorandum.

Thus an auctioneer's receipt given for the deposit money on a sale is insufficient to prove the agreement of sale if it does not mention the price (*d*). An agreement for a lease not specifying a definite term, does not satisfy the requirement of the statute (*e*). Thus a memorandum in the following words is insufficient :—" August 11, 1866. Received of D. the sum of £10 as part purchase-money of £390, of 4 cottages, situated 23, 24, 28, and 29, W.

(*a*) *Sweet v. Lee*, 3 M. & G. 452.

(*b*) Per *Tindal*, C. J., *Haues v. Armstrong*, 1 Bing. N. C. 765.

(*c*) Per *Parke*, B., *Jarvis v. Wilkins*, 7 M. & W. 412.

(*d*) *Blagdon v. Bradbear*,

12 Ves. 466 ; *Elmore v. Kingscote*, 5 B. & C. 583 ; *Goodman v. Griffiths*, 26 L. J. (Ex.) 145 ; 1 H. & N. 574.

(*e*) *Clenan v. Cooke*, 1 Sch. & Lefr. 22 ; *Fitzmaurice v. Bagley*, Ex. Ch. ; 27 L. J. (Q.B.) 143.

Street, B., ground rent £3 each, purchase to be completed within one month from this date, the lease and counterpart to be paid for by D., and to be £5, exclusive of stamps.—J. E.” It will be observed that this memorandum defines the property, the price, and the parties ; but it is obvious that a lease and not an assignment of the whole interest is intended to be conveyed, and the *duration* of that lease is not expressed (*f*). So if the names of both buyer and seller are not mentioned in the agreement it is insufficient (*g*). A late case upon the subject is very instructive (*h*). There a guaranty given by the defendant to one John Thomas, was in these words—April 27, 1857. Sir, I beg to inform you that I shall see you paid to the sum of £800 for the ensuing building which you undertake to build for Messrs. Thomas and Owens, of Cap Coch. Thomas Lake. He had intended it to be given to Thomas Jones, who was in treaty to build houses for Thomas and Owens, but Jones refusing to build them, they agreed with plaintiff to build them, and gave him the guaranty. Of this the defendant was ignorant, but he afterwards assented to the plaintiff having the guaranty. It was held that an action could not be brought upon

(*f*) *Dolling v. Evans*, 36 L. J. (Ch.) 474. 523 ; *Williams v. Byrnes*, 1 Moo. P. C., N. S. 154.

(*g*) *Boyce v. Green*, Batty, 608 ; *Warner v. Willington*, 25 L. J. (Ch.) 662 ; 3 Drew, (*h*) *Williams v. Lake*, 29 L. J. (Q. B.) 1.

the guaranty, as the plaintiff's name did not appear in it. The objection, said *Cockburn*, C. J., that there was no agreement or memorandum, or note thereof within the Statute of Frauds, must prevail on the simple ground that in order that any agreement or memorandum should be sufficient, it is absolutely necessary that the names of the parties to the agreement should appear on its face. It is said that the terms are satisfied if the note of the agreement contains a proposal which is acceded to by words. But I cannot concur in that way of putting it; the only difference between an agreement and the note of an agreement is, that in the one instance a formal agreement is meant, and in the other something not so particular in form and technical accuracy, but still containing the essentials of the agreement. The essentials of the agreement must be stated, that is to say, the subject-matter of it, the extent of the liability contracted thereby, if any, and the names of both parties to it: and I think not only is that the fair construction to be put upon the statute, but when we look at the mischief intended to be prevented, it is clear that the writing which constitutes a liability on one side, without stating the name of the other party to whom it was given, would lead to the very thing which the statute was intended to prevent, namely, fraud. There might have been an agreement for building another set of houses, or the agreement might have been of the same houses, and

this might have been put into the hands of some person to whom the defendant never intended to give a guaranty, and it might be enforced by parol evidence showing that it was intended to come into the hands of that person, while the defendant might resist it by parol evidence, so that the very contest would take place which the statute was intended to prevent. The mischief would not be effectually remedied, unless we held that this guaranty was not sufficient.

There is another observation applicable to all the five cases provided for by this section of the statute, namely, that the *agreement*, the meaning of which word I have just explained, need not be contained in a single writing, but may be collected from several. You will find that established by many cases.

Agreement
need not be
contained in
one writing,
but in several.

The purchaser of flour wrote to the vendor as follows—I hereby give you notice that the corn you delivered to me in part performance of my contract with you for one hundred sacks of good English seconds flour at 45s. a sack, is of so bad a quality that I cannot sell it or make it into saleable bread. The sacks of flour are at my shop, and you will send for them, otherwise I shall commence an action. To this the vendors answered by their attorney: “Messrs. L. consider that they have performed their contract with you as far as it has gone, and are ready to complete the remainder; and unless the flour is paid for at the expiration of one month,

proceedings will be taken for the amount." These two writings were considered to constitute a sufficient memorandum of the contract. This case was indeed decided upon the 17th section of the Statute of Frauds, but the reason of the decision applies equally to the 4th section (*i*). In another instance, on a sale by auction, the particulars of sale described the premises, and the conditions of sale were on the same sheet. The plaintiff purchased the property, and on paying the deposit, signed an agreement indorsed on the before-mentioned particulars and conditions, in the words following:—"I do hereby acknowledge myself the purchaser of the property described in the within particulars at and for the price or sum of £94. 10s., and I do hereby undertake and agree to perform my part of the conditions therein specified, in furtherance of which I have this day paid the sum of £18. 18s., being the amount of the deposit, as also the sum of £2. 7s., being my moiety of the government duty. As witness my hand this 11th day of June, 1857, Isaac Dobell" (the plaintiff). Neither the defendant nor any one for him signed the agreement, nor was his name mentioned in it or in the particulars or conditions, except that in the particulars of sale he was referred to for particulars of the premises. On discovering afterwards that a small yard mentioned in the

(*i*) *Jackson v. Lowe*, 1 Bing. 9. See *Barker v. Allan*, 29 L. J. (Ex.) 100.

particulars was not comprised in the lease purchased, which defect was not known at the time of sale to either party, the plaintiff's attorney wrote to the defendant as follows:—"We are instructed to inform you that Mr. Dobell, in consequence of your not having shown a good title to the premises offered for sale on the 11th instant as described in the particulars, declines taking the property, and we have to request that you will direct the auctioneer to return the deposit and duty received by him of Mr. Dobell, and that you will remit to us the expenses incurred in this matter, and make some arrangement for payment thereof." On this the defendant sent a letter signed by him to the plaintiff's attorney, in which he mentioned having "stated the case to counsel relating to our sale to Mr. Dobell," and added, "having obtained his opinion thereon, I beg to acquaint you that the reasonable compensation to which he is entitled (alluding to a provision in the condition for compensation) on our securing to him a lease of the yard adjoining the Aberdeen Arms, is £11. 16s. If he is willing to accede to this, the business may be completed without delay, if not, we beg to be understood as now calling on Mr. Dobell to settle the compensation in the way provided for. If he declines this, we presume you will accept Chancery process for him at our suit." In another letter to the plaintiff's attorney, the defendant expressly mentioned the abatement in the price as being

according to the condition of sale. It will be observed in this case that the letters of the defendant refer expressly and distinctly to the conditions of sale, and they had in their hands, or those of their auctioneer at the very time, the conditions of sale signed by the plaintiff to which reference is made, *so that no parol evidence of any kind was requisite to show a contract binding both parties*, except evidence of the handwriting of each, which must be adduced in all cases. For these reasons the Court of King's Bench was of opinion that there was a sufficient contract within the Statute of Frauds (*k*). In another case, Amelia Showler contracted to sell Coldham the good-will of a public-house. The agreement of purchase was a somewhat formal document, and contained all the terms of the purchase. On the back of it was written—I hereby undertake that my daughter, Amelia Showler, shall perform all the covenants and conditions named in the annexed agreement, and hold and consider myself responsible for her. Signed, James Showler (the defendant). The memorandum at the back was written after the agreement was signed, but it was proved to have been one entire transaction. The Court of Common Pleas considered that the agreement and indorsement might be looked at together for the purpose

(*k*) *Dobell v. Hutchinson*, 3 Wharton, 27 L. J. (Ch.) 46 ;
A. & E. 355 ; *Ridgway v.* 6 H. of L. C. 238.

of making out a consideration for the defendant's promise (*l*). Neither is it material that the letters, out of which the contract may be proved, are written to third parties (*m*), even to the writer's own agent, provided the contract be fully recognised therein (*n*). A remarkable instance of the application of this rule is afforded by the case of *Hammersley v. Baron de Biel* (*o*). It will be recollected that one of the cases in which a written contract or memorandum is required by the Statute of Frauds, is where any promise is made in consideration of marriage. In the present instance, proposals of marriage had been written by the lady's brothers by her father's authority, which were described therein to be the bases of the arrangement, subject, of course, to revision; and as sufficient for the proposed husband to act upon. These proposals were not signed. A letter, afterwards written and signed by the father after the marriage, admitting the terms of the written proposals, was considered as a recognition of them as his agreement, and sufficient within the Statute of Frauds.

But though, where there are several papers, the agreement may be collected from them all, provided they are sufficiently connected in sense among

(<i>l</i>) <i>Coldham v. Showler</i> , 3 C. B. 312.	<i>Smith</i> , 15 East, 103.
(<i>m</i>) <i>Welford v. Beazley</i> , 3 Atk. 503; <i>Owen v. Thomas</i> , 3 Myl. & K. 353; <i>Cooper v.</i>	(<i>n</i>) <i>Gibson v. Holland</i> , 35 L. J. (C. P.) 5.
	(<i>o</i>) 12 Cl. & Fin. 45.

themselves, so that a person looking at them all together can make out the connection and the meaning of the whole without the aid of any verbal evidence ; yet it is otherwise when such connection does not appear on the face of the writings themselves ; for, to let in parol evidence in order to connect them with one another, would be to let in the very mischief which it was the object of the framers of the Act to avoid, namely, the uncertainty and temptation to falsehood occasioned by allowing the proof of the contract to depend on the recollection of witnesses : and, therefore, where a written agreement is required by the 4th section of the statute, it is clear that several writings not bearing an obvious connection *inter se* in sense, cannot be joined together by verbal evidence to make up the agreement. This was one of the points decided in the great case of *Boydell v. Drummond* (*p*), where the plaintiff proposed to publish an edition of Shakespeare with splendid engravings, and issued a prospectus stating the terms. A copy of the prospectus lay in his shop, and beside it lay a book headed "*Shakespeare Subscribers, their Signatures :*" but there was nothing in the book about the prospectus, or in the prospectus about the book. The defendant had signed the book, and, having afterwards refused to continue taking in the Shakespeare, the plaintiff brought an action against him.

(*p*) 11 East, 142.

Now, the Shakespeare was not to be finished for some years, and therefore the case was one of those provided for by the 4th section of the Statute of Frauds, falling within the words "any agreement that is not to be performed within one year from the making thereof." It was, therefore, necessary that it should be in writing, and that that writing should be "*signed* by the party to be charged, or his agent." Now, the terms of the agreement were in the *prospectus*, and so far the statute had been complied with ; but the *signature* unluckily was in the book : and the Court held, that, as the *prospectus* did not refer to the book, or the book to it, the statute had not been complied with, and the contract could not be enforced. "If," said *Le Blanc*, J., "there had been anything in that book which had referred to the particular *prospectus*, that would have been sufficient ; if the title to the book had been the same with that of the *prospectus*, it might perhaps have done : but, as the signature now stands, without reference of any sort to the *prospectus*, there was nothing to prevent the plaintiff from substituting any *prospectus*, and saying that it was the *prospectus* exhibited in his shop at the time to which the signature related : the case therefore falls directly within this branch of the Statute of Frauds."

There is a third point common to all the five contracts mentioned in the 4th section ; it is with regard to the signature. The words are, you will

Signature of
party to be
charged.

recollect, "*signed by the party to be charged* therewith, or some other person thereunto by him lawfully authorised." This signature, it is obvious, is most regularly and properly placed at the foot or end of the instrument signed: but it is decided in many cases, that although the signature be in the beginning or middle of the instrument, it is as binding as if at the foot; although if not signed regularly at the foot there is always a question whether the party meant to be bound by it as it stood, or whether it was left so unsigned because he refused to complete it. But when it is ascertained that he meant to be bound by it as a complete contract, the statute is satisfied, there being a note in writing showing the terms of the contract, and signed by him. Therefore, where in a case of the sale of a quantity of cotton yarn, a bill of parcels was sent by the seller to the purchaser, headed:—"London, 24th Oct., 1812.—Messrs. John Schneider & Co., bought of Thomas Norris & Co., agents, cotton yarn and piece goods. No. 3, Freeman's Court, Cornhill." Following this was a list of the articles sold, the particulars, quantities, and prices. It was held, in an action for not delivering the yarn, to contain a sufficient memorandum to satisfy the requirement of the statute as to the signature of the party to be charged (q). In this case the whole of the heading of the bill of parcels was printed, except the words

(q) *Schneider v. Norris*, 2 M. & S. 286.

Messrs. John Schneider & Co. But as it was then given out to the other contracting party by the party to be charged, recognising the printed name as much as if he had subscribed his mark to it, he had recognised and avowed it as his signature (*r*). There is little or no doubt that a party may sign within this statute by stamping his signature instead of writing it (*s*). For the same reason, where the plaintiff's traveller called on the defendant with samples of hops, and agreed with him for sale of them, and the defendant thereupon wrote in a book of his own, of which he retained possession, as follows:—"Leeds, 19th Oct., 1836.—Sold John Dodgson, 27 pockets Playstead, 1836, Sussex, at 103s., the bulk to answer the sample; 4 pockets Selmes Berkleys at 95s., samples and invoice to be sent per Rockingham coach,—payment in banker's at two months," which was signed, at the defendant's request, by the plaintiff's traveller thus:—"Signed, for Johnson & Co., D. Morse," this was deemed a sufficient signature of the contract to bind the defendant (*t*). But of course, where it appears that, notwithstanding the insertion of the parties' names in the instrument, it was intended that their signatures

(*r*) See *Saunderson v. Jackson*, 2 Bos. & P. 238.

(*s*) *Bennett v. Brumfitt*, 37 L. J. (Ch.) 25.

(*t*) *Johnson v. Dodgson*, 2

M. & W. 653. See *Lobb v. Stanley*, 5 Q. B. 574; *Lewis v. Lord Kensington*, 2 C. B. 463.

should be affixed in the proper place, such an instrument would not be a compliance with the statute, as it could not be considered as signed by them. Therefore, where articles of agreement contained the terms of a contract which was not to be performed within a year, purporting to be made between certain persons whose names were stated at the commencement of the articles, and who were described as the contracting parties, and concluded with the words, "As witness our hands," without being followed by any name or signature, they were held not to be sufficiently signed within the Statute of Frauds (*u*). And as a signature in print is good, so is a signature in pencil. This, indeed, was held in a case of a pencil indorsement of a promissory note, but it seems equally applicable to the signature required by the Statute of Frauds (*x*). The signature is to be that of the party *to be charged*; and, therefore, though, as I have pointed out to you, both sides of the agreement must appear in the writing, the consideration as well as the promise, it is not necessary that it should be signed by both the parties; it is sufficient if the party suing on it is able to produce a writing signed by the party whom he is seeking to *charge* (*y*). The person who seeks to enforce the agreement has not the other altogether at his

(*u*) *Hubert v. Treherne*, 3 C. 234.
M. & G. 743.

(*y*) *Laythoarp v. Bryant*, 2

(*x*) *Geary v. Physio*, 5 B. & Bing. N. C. 735.

mercy, but must fulfil his own part of the agreement before he can seek performance on the part of the person who has signed (z).

But although the written memorandum may be made and signed subsequently to the making of the contract (a), yet it must exist before an action is brought upon it (b).

The last point I shall mention common to all the contracts falling within *this* section regards the consequence of non-compliance with its provisions. This consequence is, not that the unwritten contract shall be void, but *that no action shall be* brought to charge the contracting party by reason of it (c). And cases may occur in which the contract may be made available without bringing an action on it; and in which, consequently, it may, though unwritten, be of some avail. Thus, for instance, if it has been partly executed, Courts of Equity will enforce its complete performance (d); and if money have been paid in pursuance of it, that payment is a good one for all purposes: thus, where £100 was paid by the incoming tenant to the outgoing one, partly for himself, and partly for the landlady, in

Effects of non-compliance with statute.

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|-----------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| (z) <i>Reuss v. Picksley</i> , 35 L. J. (Ex.) 218, Ex. Ch. | <i>Laythoarp v. Bryant</i> , supra. See <i>In re Hilliard</i> , 2 D. & L. 919; <i>Sweet v. Lee</i> , 3 M. & G. 452; <i>Crosby v. Wadsworth</i> , 6 East, 611; see <i>Carrington v. Roots</i> , 2 M. & W. 248. |
| (a) <i>Leroux v. Brown</i> , 22 L. J. (C. P.) 1; 12 C. B. 801. | (d) Sugden, V. & P. c. 3, s. 7. |
| (b) <i>Bill v. Bament</i> , 9 M. & W. 36, <i>quære</i> ,—see <i>Fricker v. Tomlinson</i> , 1 M. & G. 772. | |
| (c) Per <i>Bosanquet</i> , J., in | |

pursuance of a verbal agreement, and the incoming tenant refused to pay the landlady her share, saying that there was no writing, and that words were but wind, the landlady brought her action, and Lord *Ellenborough* non-suited her, on the ground that the agreement, being for an interest in land, ought to have been in writing ; but the Court of Queen's Bench set aside the non-suit, with Lord *Ellenborough's* own concurrence (e). And where, to an action for goods sold, the defendant pleaded an agreement that, in consideration of the defendant giving up possession of certain premises and stock-in-trade, the plaintiff should pay him £100, and also discharge him from all debts and causes of action, which premises had been given up and the £100 paid ; it was decided that this accord and satisfaction might be proved by parol ; although, if it had been required to enforce the delivery up of possession of the premises, a writing might have been necessary (f). An instructive case has recently been decided upon the point now under consideration. A parol contract had been entered into in France, by which the defendant, who resided in England, agreed with the plaintiff, a British subject residing in France, to employ the plaintiff as the defendant's agent to collect eggs and poultry in France, and to send them over to the defendant

(e) *Griffith v. Young*, 12 East, 513. See *Cocking v. Ward*, 1 C. B. 858. (f) *Lavery v. Turley*, 30 L. J. (Ex.) 49.

in England, the service to be for one year from a future day, at £100 a-year. This contract, although not being in writing, it could not be enforced by action in England, was valid in France, and as such, by the comity of nations, would in its nature be valid in England ; yet, upon the principle that the 4th section of the Statute of Frauds does not invalidate the contract, but relates to the mode of procedure only, the Court of Common Pleas held that the action would not lie (g).

I have now pointed out to you the matters in which all simple contracts agree, and the practical differences which exist between the effect of *written* and that of *parol contracts*, although both sorts fall within the denomination *Simple Contracts*. I have described the consequences which follow from the rules of evidence upon the reduction of any contract whatever into writing ; as well as those consequences which follow from the provisions of the Statute of Frauds, in the cases to which it is applicable.

(g) *Leroux v. Brown*, 22 L. J. (C. P.) 1; 12 C. B. 801.

LECTURE III.

THE FOURTH SECTION OF THE STATUTE OF FRAUDS.
 —PROMISES BY EXECUTORS AND ADMINISTRATORS.—GUARANTIES.—MARRIAGE CONTRACTS.—
 CONTRACTS FOR THE SALE OF LAND.—AGREEMENTS NOT TO BE PERFORMED IN A YEAR.

I HAVE now touched on the points which equally apply to each of those five species of contracts to which the 4th section of the Statute of Frauds relates ; those, namely, which regard the appearance in the writing of the consideration and other terms as well as the promise, the *signature* which the statute requires, and the consequences of not reducing into writing contracts which the statute requires should be so evidenced. It remains, before terminating the consideration of that section of the Act, to consider each of the five particular species of contracts to which it applies.

Sect. 4.
 Promises by
 executors and
 administra-
 tors.

The *first* is—*any special promise by an executor or administrator to answer damages out of his own estate*.

The principal case on this subject is *Rann v. Hughes* (a), which went up to the House of Lords.

(a) 7 T. R. 350, n. ; 4 Bro. C. C. 27. *Forth v. Stanton*, 1 Wms. Saund. p. 211, n. 2.

The point decided in that case is, that the Statute of Frauds in no manner affected the validity of such promises, or rendered them enforceable in any case in which at common law they would not have been so ; but merely required that they should be reduced into writing, leaving the written contract to be construed in the same manner as a parol contract would have been, had there been no writing. The opinion of the judges was delivered to the House of Lords by L. C. Baron *Skynner*, and is extremely instructive. Being very short, it is here inserted :—“It is undoubtedly true that every man is by the law of nature bound to fulfil his engagements. It is equally true that the law of this country supplies no means nor affords any remedy to compel the performance of any agreement made without sufficient consideration. Such agreement is *nudum pactum ex quo non oritur actio* ; and whatever may be the sense of this maxim in the civil law, it is in the last-mentioned sense only that it is to be understood in our law. The declaration states that the defendant, being indebted as administratrix, promised to pay when requested, and the judgment is against the defendant generally. The being indebted is of itself a sufficient consideration to ground a promise, but the promise must be co-extensive with the consideration, unless some particular consideration of fact can be found here to warrant the extension of it against the defendant in her own capacity. If a

person indebted in one right, in consideration of forbearance for a particular time, promise to pay in another right, this convenience will be a sufficient consideration to warrant an action against him or her in the latter right ; but here no sufficient consideration occurs to support this demand against her in her personal capacity, for she derives no advantage or convenience from the promise here made. For if I promise generally to pay upon request what I was liable to pay upon request in another right, I derive no advantage or convenience from this promise, and therefore there is not sufficient consideration for it. But it is said that if this promise is in writing, that takes away the necessity of a consideration, and obviates the objection of *nudum pactum*, for that cannot be where the promise is put in writing : and that after verdict, if it were necessary to support the promise that it should be put in writing, it will after verdict be presumed that it was in writing : and this last is certainly true ; but that there cannot be *nudum pactum* in writing, whatever may be the rule of the civil law, there is certainly none such in the law of England. All contracts are by the laws of England distinguished into agreements by specialty and agreements by parol ; nor is there any such third class, as some of the counsel have endeavoured to maintain, as contracts in writing. If they be merely written and not specialties, they are parol, and a consideration must be proved. But it is said

that the Statute of Frauds has taken away the necessity of any consideration in this case; the Statute of Frauds was made for the relief of personal representatives and others, and did not intend to charge them further than by common law they were chargeable." His Lordship here read those sections of that statute which relate to the present subject. He observed, "that the words were merely negative, and that executors and administrators should not be liable out of their own estates, unless the agreement upon which the action was brought, or some memorandum thereof, was in writing and signed by the party. But this does not prove that the agreement was still not liable to be tried and judged of as all other agreements merely in writing are by the common law, and does not prove the converse of the proposition, that when in writing the party must be at all events liable. He said that all his brothers concurred with him that in this case there was not a sufficient consideration to support this demand as a personal demand against the defendant, and that its being now supposed to have been in writing makes no difference."

The next species of promise mentioned in the 4th section is, *any special promise to answer for the debt, default, or miscarriage of another person.*

This includes all those promises which we ordinarily denominate *guaranties*, and has given rise to a very great deal of discussion.

In the first place, it has been decided, that the

Guaranties.
Person whose debt is guaranteed must be himself liable.

sort of promise which the statute means, and which must be reduced into writing, is a promise to answer for the *debt, default, or miscarriage of another person, for which that other person himself continues liable*. Thus, if A. go to a shop, and say, "Let B. have what goods he pleases to order, and if he do not pay you *I* will," that is a promise to answer for a debt of B. for which B. is himself also liable : and if it be sought to enforce it, it must be shown to have been reduced into writing (b) : but, if A. had said, "Let B. have goods on my account," or "Let B. have goods, and charge me with them :"
in these cases, no writing would be required, because B. never would be liable at all, the goods being supplied on A.'s credit and responsibility, though handed by his directions to B.

Upon these grounds where there were three executors and trustees, and the defendant, who was one of them, renounced to enable himself to purchase some of the testator's property, which, while trustee, he could not do without leave of the Court, and afterwards purchased the property, and losses were incurred by the trustees, and a claim for them was raised in Equity by the legatees, whereupon the defendant, by his solicitor, wrote to them agreeing to pay £3000. in satisfaction of these losses ; the Court of Chancery held that this letter was not within the Statute of Frauds as a promise to

(b) *Birkmyr v. Darnell*, *Forth v. Stanton*, 1 Wms. Salk. 27 ; and the notes to *Saund.* 211, b.

answer for the debt of another, as the defendant either was, or supposed himself to be liable (c).

For this reason, where the plaintiff had issued execution against Lloyd for debt, and Lloyd, with the plaintiff's consent, conveyed all his property to defendant, who thereupon undertook to pay the plaintiff the debt due from Lloyd upon the plaintiff's withdrawing the execution, and giving up his claim on Lloyd, the defendant's undertaking was held not to be a promise to answer for another's debt for which that other remained liable (d).

But where Buxton had sued the defendant in Chancery, and had retained plaintiff in that suit as his solicitor, and costs had been incurred to the plaintiff, and it was agreed by the three that the suit should be discontinued, and that the defendant should pay the plaintiff these costs, it was held that since Buxton's debt to the plaintiff remained, the defendant's promise was to pay the debt of another, and could not be sued upon, not being in writing (e). In another instance, the plaintiff became bail for one Hadley, at the defendant's request, and upon his promise to indemnify the plaintiff from all damages and expenses which he should sustain by reason of his so becoming bail ;

(c) <i>Orrell v. Coppack</i> , 26 L. J. (Ch.) 269 ; <i>Adams v. Dansey</i> , 6 Bing. 506 ; <i>Batson v. King</i> , 28 L. J. (Ex.) 327.	(d) <i>Bird v. Gammon</i> , 3 Bing. N. C. 883.
	(e) <i>Tomlinson v. Gell</i> , 6 A. & E. 564.

and the Court clearly held this was a promise to answer for the default of another, and was not the less so because it was in the form of a promise to indemnify (*f*). In a recent case the plaintiff contracted to supply A. with iron plates, and delivered a part of them, but refused to deliver the rest unless he was paid in cash. The defendant, who had an interest in the contract, thereupon agreed that if the plaintiff would deliver the remainder he would cash A.'s acceptances for the goods already and thereafter to be delivered, and protect the plaintiff from the bills when due. The defendant was to receive 3 per cent. on the amount of the bills. This was held to be an engagement to answer for the debt or default of another, and not being in writing could not be enforced (*g*).

Goodman v. Chase (*h*) presents rather a singular instance of the application of the rule of construction of which I have been speaking. In that case, a debtor had been taken in execution, and Chase, in consideration that the creditor would discharge him out of custody, promised to pay his debt. It was held, that this promise need not be in writing; for that, by discharging the debtor out of execution, the debt was gone; it being, as you are probably

(*f*) *Green v. Cresswell*, 10 L. J. (C. P.) 243; *S. C.* in A. & E. 453. See *Cripps v. Ex. Ch.* 35 L. J. (C. P.) 40.
Hartnoll, 32 L. J. (Q. B.) 381, (*h*) 1 B. & A. 297. *Butcher v. Stewart*, 11 M. & W. 857.
 Ex. Ch.

(*g*) *Mallett v. Bateman*, 33

aware, a rule of law, that if a debtor be once taken in execution and discharged by his creditor's consent, that operates as a satisfaction of the debt; and therefore that the debtor, having ceased to be liable, the promise to pay the amount was not a promise to pay any sum for which another person was responsible, and therefore did not require to be reduced into writing. If what was originally the debt of another has been made by the defendant his own debt, it cannot afterwards, as between the creditor and himself, be considered the debt of another (i).

But it was at one time thought that a verbal promise, even to answer for the debt of another for which that other remained liable, might be available if founded on an entirely new consideration conferring a distinct benefit upon the party making such promise. This idea is, however, confuted by Serjt. Williams in his elaborate note to the case of *Forth v. Stanton* (k). The rule there laid down by him, which has ever since been approved of, is, that the only test and criterion by which to determine whether the promise needs to be in writing, is the question whether it is or is not a promise to answer for a debt, default, or miscarriage of another, for which that other continues liable (l). If it be

Rule to determine where promise must be in writing.

(i) *Fitzgerald v. Dressler*, B. & C. 855; *Taylor v. Hilary*, 29 L. J. (Ch.) 113.

(k) 1 Wms. Saund. 211. *v. Stallard*, 5 Taunt. 450.

(l) *Hodgson v. Anderson*, 3

so, it must be reduced into writing: nor can the consideration in any case be of importance except in such cases as *Goodman v. Chase*, in which the consideration to the person giving the promise is something which extinguishes the original debtor's liability (*m*). It has also been considered, that, in order to make the statute applicable, the immediate object for requiring the defendant's liability must be, that he shall pay the debt of another if that other does not; and that, consequently, where the immediate object is that an agent, in selling for a principal, should take unusual care in selecting the customers, and by assuming responsibility for their solvency should preclude all question of negligence on his part, as where an agent sells on a *del credere* commission, the undertaking so to do need not be in writing (*n*); for, although the transaction may terminate in a liability to answer for the debt of another, his paying that debt was not the immediate object of the contract made with him.

Default other
than breach
of contract.

The default or miscarriage of another person to which the statute applies need not, however, be a default or miscarriage in payment of a debt or in performing a contract. Any duty imposed by the law, although not the performance of a contract, against the breach of which it was the intention of

(*m*) You will see Serjt. Williams's criterion approved of in *Green v. Cresswell*, 10 A. & E. 453, and *Tomlinson v.*

Gell, 6 A. & E. 564.

(*n*) *Couturier v. Hastie*, 9 Exch. 102; 22 L. J. (Exch.) 97, S. C.

the parties to secure and be secured, must be proved by writing. Thus, where one had improperly ridden another's horse, and thereby caused its death, a promise by a third person to pay a sum of money in consideration that the owner of the horse would not sue the wrong-doer was adjudged to be unavailable, because in parol only (o).

In the case of *Eastwood v. Kenyon* (p), the Court of Queen's Bench decided a completely new point on the construction of this branch of the 4th section. They held that the *promise*, which is to be reduced into writing, is a promise made to the person to whom the original debtor is liable ; but that a promise made to the debtor himself, or even to a third person, to answer to the creditor, would not require to be reduced into writing (q).

Promise to
be made to
creditor.

That, in all cases within the 4th section, the consideration for the promise as well as the promise itself, must, by the statute, appear in the written memorandum, has been already explained. But as to promises to answer for the debt, default, or mis-carriage of another person, it is no longer necessary that the consideration should appear upon the face of the written memorandum. By the Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97, s. 3, no special promise to be made by any person after the passing of this Act (29th July, 1856) to answer for

Consideration
of guaranty
need not
appear.

(o) *Kirkham v. Martyr*, 2 B. & A. 613.

(p) 11 A. & E. 438.

(q) *Hargreaves v. Parsons*, 13 M. & W. 561. See *Reader v. Kingham*, 32 L. J. (C. P.) 108.

the debt, default, or miscarriage of another person, being in writing and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorised, shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document (r).

**Actions for
fraudulent
misrepresenta-
tions.**

There is one thing which, though collateral to the Law of Contracts, relates so peculiarly to this branch of the Statute of Frauds, that I think it ought to be mentioned. After the 4th section of the Statute of Frauds had rendered verbal guaranties unavailable, actions upon the case for *false representations*, under circumstances in which, before the Act, the transaction would have been looked on as one of guaranty, were often brought. For instance, if A. went to a tradesman to persuade him to supply goods to B., by assuring him that he should be paid for them, the tradesman, in case of B.'s default, could not bring an action of assumpsit as upon a guaranty, because there was no written memorandum of what passed ; but he brought an action on the case, in which he accused A. of having knowingly deceived him as to B.'s ability to pay : and if the jury thought this case made out, he suc-

(r) *Glover v. Hackett*, 26 L. J. (Ex.) 416 ; 2 H. & N. 487.

ceeded in his action, and received pretty nearly the same sum as he would have done if there had been a guaranty. However, as this was inconsistent with the object of the Statute of Frauds, the legislature put an end to it by enacting, in statute 9 Geo. IV. c. 14, s. 6, commonly called Lord Tenterden's Act (which, however, is not confined to cases within the Statute of Frauds (*s*)), "that no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money or goods *upon (*t*), unless such representa- * *Sic.* tion or assurance be made in writing, signed by the party to be charged therewith."

A trader being in bad circumstances and indebted to the defendant, applied to plaintiff for goods on credit, and referred him to defendant for her character; in fact, she had dealt with defendant to a considerable amount, but had fallen into arrear, and defendant had ceased to supply her for some time, but had gone on again upon her undertaking to discharge her arrears at so much per week. The

(*s*) *Devaux v. Steinkeller*, goods upon," which were added per *Tindal*, C. J., 6 Bing. in the Committee upon the N. C. 88. Bill, should precede the word

(*t*) It was probably intended "credit." that the words "money or

plaintiff inquired of the defendant's shopman as to her credit, and defendant, on being referred to by the shopman, said, that he might give her a fair character, which the shopman repeated to the plaintiff, and he thereupon trusted her with goods. These goods she sold, and paid defendant with the proceeds, but never paid the plaintiff. The Court of King's Bench decided that evidence of the defendant's representation through his shopman to the plaintiff could not be admitted, not having been made in writing (u).

It has since been considered in the construction of this statute, that a representation by a person, that the title-deeds of an estate which A. had bought were in that person's possession, that nothing could be done with the estate without his knowledge, and consequently that the plaintiff would be safe in lending money to A., was a representation made concerning A.'s ability; and, therefore, as it was not in writing, the defendant was not liable on account of its falsehood (x). It has also been considered that a representation by a partner as to the credit of a firm in which he was a partner is a representation as to the credit of another person within the meaning of the statute (y).

In *Wade v. Tatton*, which is the last reported case on the subject, and which was decided in the

(u) *Haslock v. Ferguson*, 7 E. 457.

A. & E. 86.

(y) *Devaux v. Steinkeller*, 6

(x) *Swan v. Phillips*, 8 A. & Bing. N. C. 84.

Court of Exchequer Chamber, that Court determined that where a written representation is made as to the character of a third person, and also a parol representation of the character of the same person, and the person deceived thereby trusted to both representations, and would not have trusted to either of them alone, that the party deceived thereby may maintain an action—a material part of the representation having been made in writing (z).

The effect of this section was also much discussed in the great case of *Lyde v. Barnard* (a), in which the Judges of the Court of Exchequer differed, but the judgments in which will repay a very attentive perusal.

The third of the species of contracts enumerated by the 4th section, and required by it to be evidenced in writing is—*any agreement made in consideration of marriage*.

Agreements
in considera-
tion of
marriage.

It has been decided, that an agreement between two persons to marry is not an agreement in consideration of marriage within the meaning of this enactment; it probably having been considered that the Legislature did not intend to introduce a practice so contrary to the natural usages of life; but that these terms are confined to promises to do something in consideration of marriage other than the performance of the contract of marriage itself (b).

(z) 25 L. J. (C. P.) 240; 18
C. B. 371.

(a) 1 M. & W. 101.

(b) *Cork v. Baker*, 1 Str.
34; *Harrison v. Cage*, 1 Ld.
Raym. 386.

Thus a promise made by the intended husband to the intended wife before marriage to settle her personal property on her, will not be carried into effect by the Court of Chancery unless evidenced by writing (c). But if so evidenced it would be otherwise, although the writing acknowledged the promise to have been made before the wedding, but it was, in fact, made after (d). And where a promise was made by a testator to the intended husband of his daughter, previous to her marriage, that she should share in the testator's property equally with the rest of his children, and the daughter married the plaintiff, and died in the testator's lifetime, leaving issue, but the testator, who had not given anything to the daughter on her marriage, gave by his will a legacy to one surviving daughter, and bequeathed the residue of his property to another, leaving nothing to his deceased daughter or to the plaintiff, her husband, it was held that the promise of the testator to the plaintiff, although verbal only, yet being repeated in terms in an affidavit made by the testator in a former legal proceeding against the plaintiff, the affidavit was a sufficient compliance with the requirements of the statute (e).

(c) *Countess of Montacute v. Morgan*, 12 Ves. 73.
Maxwell, 1 Str. 236; 1 P. Wms. 618; *Tweddle v. Atkinson*, 30 L. J. (Q. B.) 265. (e) *Barkworth v. Young*, 26 L. J. (Ch.) 153; *Hammersley v. De Biel*, 12 C. & Fin. 45.
 (d) *Id.*; *s. v. Randall v.*

We now come to the fourth class of promises, enumerated by the 4th section, viz.—*any contract, or sale of lands, tenements, or hereditaments, or any interest in or concerning them.*

Contracts or
sale of lands.

These words, you will observe, are exceedingly large, comprehending not merely an interest in land itself, but any interest *concerning* it. And the main questions which have arisen have accordingly been—Whether particular contracts, falling very near the line, do or do not *concern land*, so as to fall within these terms. Thus it was held in *Crosby v. Wadsworth* (*f*), that an agreement conferring an exclusive right to the vesture of land (*i. e.*, a growing crop of mowing grass), during a limited time and for given purposes, is a contract for sale of an interest in, or at least *concerning* lands; and for the non-performance of which, if made by parol, an action cannot be maintained. In *Tyler v. Bennett* (*g*), an agreement that the plaintiff should be allowed to take water from a particular well was held to concern land, and to require a writing. On the other hand, in *Evans v. Roberts* (*h*), where the plaintiff had sold to the defendant a growing crop of potatoes, this was decided not to be a sale of any *interest in or concerning land*. It was contended, that, as the potatoes were deriving nourishment and support from the soil, and would have passed as part of the

What a
contract
concerning
land.

(*f*) 6 East, 602; *Carrington v. Roots*, 2 M. & W. 248.

(*g*) 5 A. & E. 377.

(*h*) 5 B. & C. 829 (*b*).

land by a conveyance of it, an interest in them must at all events be taken to *concern* land ; and great reliance was placed on the decision in *Crosby v. Wadsworth*, which I have already cited ; where a growing crop of grass was sold and was to be mowed by the vendee, and the sale was held to fall within the statute, and to require a writing. However, the Court held that that case was distinguishable. “ Although,” said Mr. Justice *Holroyd*, “ the vendee might have had an incidental right by virtue of his contract to some benefit from the land while the potatoes were arriving at maturity, yet I think he had not an interest in the land within the meaning of this statute : he clearly had no interest so as to entitle him to the possession for any period, however limited, for he was not to raise the potatoes. Besides, this is not a contract for the sale of the produce of any specific part of the land, but of the produce of a cover of land. The plaintiff did not acquire by the contract any interest in any specific portion of the land ; the contract only binds the vendor to sell and deliver the potatoes at a future time at the request of the buyer, and he was to take them away.”

With regard to this case, it is worth while to observe, that though, according to the decision of the Court, the contract did not fall within the 4th section, as the sale of an interest in or concerning lands, yet it would clearly fall within the 17th, to which, before the conclusion of these Lectures, I

shall have occasion to advert, as being a sale of goods and chattels ; but no point arose upon that section, because one shilling had been paid as *earnest money*, which is one of the modes of satisfying the provisions of the 17th section.

The result of these cases, and of the many others which have been decided upon the subject, is thus stated in Williams' Saunders (i) : It appears to be now settled, that, with respect to emblements or *fructus industriales* (i. e., the corn and other growth of the earth, which are produced, not spontaneously, but by labour and industry), a contract for the sale of them while growing, whether they are in a state of maturity, or whether they have still to derive nutriment from the land in order to bring them to that state, is not a contract for the sale of any interest in land, but merely for the sale of goods : *Evans v. Roberts* (k) ; *Sainsbury v. Mathews* (l). And it will make no difference whether they are to be reaped or dug up by the buyer or by the seller : *Jones v. Flint* (m). The true question is, whether, in order to effectuate the intention of the parties, it be necessary to give the buyer an interest in the land, or whether an easement of the right to enter the land for the purpose of harvesting and carrying

(i) *Duppa v. Mayo*, 1 Wms. Saund. 277 c, n. (f). A similar and very clear view of this subject is also taken by Lord St. Leonards—see Con-

cise View of Law of V. & P. 75, ed. 1851.

(k) 5 B. & C. 829.

(l) 4 M. & W. 343.

(m) 10 A. & E. 753.

them away is all that was intended to be granted to the buyer. But with respect to grass, which, as being the natural produce of the land, is said to be not distinguishable from the land itself in legal contemplation until actual severance, the decision of *Crosby v. Wadsworth*, appears to be still adhered to, viz., that the purchaser of a crop of mowing grass, unripe, and which he is to cut, takes an exclusive interest in the land before severance; and therefore the sale is a sale of an interest in land within the statute (*n*). So it has been held, that the sale of growing underwood to be cut by the purchaser confers an interest in land within the statute (*o*). The same has been held as to an agreement for the sale of growing fruit (*p*). But where the owner of trees growing on his land (but after two had been cut down) agrees with another while the rest are standing to sell him the timber, to be cut by the vendor, at so much per foot, this is a contract merely for the sale of goods (*q*). The timber was to be made a chattel for the seller (*r*). And, per *Littledale, J.*, even if the contract were for the sale of the trees, with a specific liberty to the vendee to enter the land to cut them, this would

(*n*) *Carrington v. Roots*, 2 M. & W. 501.
M. & W. 248.

(*o*) *Scorell v. Boxall*, 1 Y. & B. 396; *Teal v. Auty*, 2 B. & B. 99.

(*p*) *Rodwell v. Phillips*, 9

(*q*) *Smith v. Surman*, 9

B. & C. 561.

(*r*) *Lord Falmouth v. Thomas*, per *Bailey, B.*, 1

C. & M. 105.

not give him an interest in the land within the meaning of the statute (s). In a recent case on this subject where the plaintiff and defendant orally agreed (in August) that the defendant should give £45. for the crop of corn on the plaintiff's land, and the profit of the stubble afterwards, that the plaintiff was to have liberty for his cattle to run with the defendant's, and that the defendant was also to have some potatoes growing on the land and whatever lay grass was in the fields, and the defendant was to harvest the corn and dig up the potatoes, and the plaintiff was to pay the tithe ; it was held, that it did not appear to be the intention of the parties to contract for any interest in land, and the case was not, therefore, within the statute, but a sale of goods as to all but the lay grass, and as to that a contract for the agistment of the defendant's cattle (t)

Upon very similar reasoning, when a tenant having a right to remove fixtures, left them in the house upon a parol agreement with the landlord that he should take them at a valuation, the Court were quite satisfied that this was not a sale of any interest in land (u).

Neither does an agreement for board and lodging amount to a contract for an interest in land ; and a person having agreed with a boarding-house keeper

(s) B. & C. 573 ; *Evans v. Wms. Saund.* 277 c, n. (f).

Roberts, 5 B. & C. 829. (u) *Hallen v. Runder*, 1 C.

(t) *Jones v. Flint*, 10 A. & M. & R. 266.

E. 753 ; *Duppa v. Mayo*, 1

for board and lodging for himself and servant, and accommodation for a horse, for £200. a year; and having afterwards refused to enter on the occupation, was held liable to an action, although the whole that passed between them was by word of mouth. The agreement was merely that the proposed lodger should become and be received as an inmate in the house and family (x).

But an agreement to occupy lodgings at a yearly rent, the occupation to commence at a future day, is an agreement for an interest in land within the 4th section (y).

And such also is an agreement, that, if one will take possession of a house and become tenant upon its being properly furnished, the other will furnish it properly (z).

Such also was considered an agreement on the sale of a milk-walk for £80., on which it was agreed that the purchaser should go into and occupy the premises of which the vendor was tenant, and should be tenant of them from Midsummer then past, and should pay the rent, rates, and taxes. The defendant entered, but finding the business not so extensive as he expected, refused to pay the whole of the £80. The Court considered that the plaintiff agreed to consign his interest in the premises, such

(x) *Wright v. Stavert*, 29 L. J. (Q. B.) 161.

(y) *Inman v. Stamp*, 1 Stark. N. P. C. 12.

(z) *Mechelen v. Wallace*, 7 A. & E. 49; *Vaughan v. Hancock*, 3 C. B. 766.

as it was, to the defendant, and the latter agreed to pay the rents, rates, and taxes, from the last quarter, and that it was, therefore, expressly within the statute (a).

The same conclusion has been come to where one entered into an agreement with another to relinquish, and give possession to him of a furnished house for the residue of a term which the former had therein, in consideration of a sum of money to be paid by the latter for certain repairs to be done to the house. It was considered that the contract was not merely that one side should repair and relinquish possession, and the other pay the money for the repairs, but that the relinquishment being for the remainder of a term, an assignment was contemplated, which was clearly an interest in land (b). The law is the same whether the interest agreed to be assigned or parted with be legal or equitable (c). And the same rule that the contract cannot be enforced unless in writing applies, although the consideration for the defendant's part of the contract has been performed, and nothing remains to be done but the payment of the money (d).

But when a contract was, that in consideration that the plaintiff would advance £2000. upon the

(a) *Smart v. Harding*, 24 L. J. (C. P.) 76; 15 C. B. 652. (c) *Kelly v. Webster*, 21 L. J. (C. P.) 163; 12 C. B. 283.

(d) *Cocking v. Ward*, supra; (b) *Buttemere v. Hayes*, 5 M. & W. 456; *Cocking v. Ward*, 1 C. B. 858. *Kelly v. Webster*, supra. See p. 122.

security of a mortgage of certain land upon the defendant making out a good title to mortgage it, the defendant promised to pay him the expenses to which he might be subjected, in case the loan should go off by reason of the defendant changing his views or of the defectiveness of the defendant's title, the Court of Exchequer clearly held that the contract merely related to the investigation of the title, and did not relate to any interest in land (e).

The statute affects the right of action only.

In all these cases, however, the observation applies which I have made in the former lecture with reference to cases falling within this section in general. The contract, even if by mere *words*, is not void, but merely incapable of being enforced by action (f). And therefore it has been held, that, if it actually has been executed, for instance, in the case of a sale of growing crops, by the vendee's reaping them and taking them away, an action will lie to recover the price as for goods sold and delivered (g). But it must be remembered that the cases here cited can hardly be considered to relate to an interest in land, and therefore do not apply to this head.

A curious point has been decided upon this section with reference to a parol *demise* of land.

(e) *Jeakes v. White*, 21 L. J. (Ex.) 265; 6 Ex. 873.

(f) *Lerouz v. Brown*, 22 L. J. (C. P.) 1; 12 C. B. 801. See *Laycock v. Pickles*, 23 L. J. (Q. B.) 43.

(g) *Parker v. Staniland*, 11 East, 362; *Poulter v. Killingbeck*, 1 B. & P. 397. And see the judgment in *Teal v. Auty*, 2 B. & B. 99.

Such a *demise*, if for not more than three years, is good within the Statute of Frauds, the 1st section of which enacts, that "*all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to, or out of any messuages, manors, lands, tenements or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorised by writing, shall have the force and effect of leases or estates at will only.*" The 2nd section excepts "*all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount unto two third parts at the least of the full improved value of the thing demised*" (*h*). But an *agreement* for such a lease falls, not within the 1st, but within the 4th section; for it is an agreement for an interest in lands; and, therefore, though a lease for a year would be perfectly good though made verbally, an agreement for such a lease cannot be enforced. That was the point decided in *Edge v. Strafford* (*i*): "It may be said," said *Bayley, B.*, delivering the judgment of the Court in that case, "that it is strange that the 2nd section of the statute has made a lease for less than three years from the making valid; and yet that no action shall be maintainable upon it until it is

(*h*) 29 Car. II., c. 3, ss. 1, 2. (*i*) 1 C. & J. 391; 1 Tyr.
See 8 & 9 Vict. c. 106, s. 3. 293.

made effectual as a lease by the entry of the lessee. But, first, the legislature might intend to make a distinction between those cases in which the complaining party was contented to confine himself to its operation as a lease, and sought nothing more than as a lease it would give him, and those in which he went further, and founded upon it a claim for damages, which might far exceed what he could claim under it in the character of a lease ; or, secondly, this distinction might not have been contemplated, but may be the result of the true construction of the Statute of Frauds. The 1st section of that statute provides—that all leases, estates, interests of freehold, or term of years, or any uncertain interest in lands, made by livery and seisin only, or by parol, and not put in writing, &c., shall have the force and effect of leases or estates at will only ; and excepts, nevertheless, all leases not exceeding three years from the making thereof, whereupon the rent reserved shall amount to two-thirds of the full improved value. The 4th section enacts, that no ‘action shall be brought whereby to charge the defendant upon any *contract or sale* of lands, or *any interest* in or concerning them, unless the agreement on which such action shall be brought, or such memorandum thereof, be in writing.’ Is, then, the agreement on which this action is brought ‘*a contract of an interest in lands?*’ *Inman v. Stamp* (k) says distinctly it is: unless that case

(k) 1 Stark. 12.

be successfully impeached, it must govern the present."

The last case provided for is that of *any agreement that is not to be performed within the space of one year from the making thereof*. Thus if a servant be hired for a year, and the service is to begin at a future time, the agreement ought to be in writing, since it will not be performed within a year (*l*). It has been decided, that the *agreements* meant by this section are not *agreements* which may or may not happen to be performed within a year, but agreements which, on the face of them, contemplate a longer delay than a year before their accomplishment. *Peter v. Compton* (*m*), the case usually cited as establishing this distinction, affords also a very good illustration of it. It was an action upon an agreement, in which the defendant promised for one guinea to give the plaintiff ten on the day of his marriage. The case was tried before Lord *Holt*, who reserved the question, whether a writing was necessary, for the opinion of all the Judges, a majority of whom were of opinion, "that, where the agreement is to be performed upon a contingency, and it does not appear within the agreement that it is to be performed

Contracts not to be performed within a year.

(*l*) *Bracegirdle v. Heald*, 1 B. & Ald. 722; *Snelling v. Lord Huntingfield*, 1 Cr. M. & R. 20; *Giraud v. Richmond*, 2 C. B. 835; *Leroux v. Brown*, 22 L. J. (C. P.) 1; 12 C. B. 801. See *Caiothorn v. Cordrey*, 33 L. J. (C. P.) 152.
(*m*) *Skinner*, 353; 1 Smith, L. C., 5th ed. 283.

after the year, there a note in writing is not necessary, for the contingency might happen *within* the year; but where it appears by the whole tenor of the agreement that it is to be performed after the year, there a note in writing is necessary, otherwise not." There was a difference of opinion among the Judges in this case, and it is remarkable that Lord *Holt* himself differed from the majority. However, their construction has been frequently adopted since that time.

Thus, also in *Fenton v. Emblers* (n), in consideration that the plaintiff would be and continue his servant as long as they should both please, the defendant promised to leave her, by his last will, an annuity for her life; and it was considered that the statute did not apply, it not being expressly and specifically agreed that the agreement should not be performed within the year. In *Wells v. Horton* (o), which was a promise by a testator that his executor should, at his death, pay the plaintiff £10,000., it was held that no writing was required to prove it; and *Best*, C. J., said, the plain meaning of the words of the statute is confined to contracts which, by agreement, are not to be carried into execution within a year, and does not extend to such as may by circumstances be postponed beyond that period; otherwise, there is no contract which might not

(n) 3 Burr. 1278.

(o) 4 Bing. 40.

fall within the statute. *Souch v. Strawbridge* (p) was a case in which it was proved that there had been a proposal that the plaintiff should keep an infant child for the defendant for one year, at 5s. a-week, which he objected was too much for so young a child ; and it was then settled that it should remain with the plaintiff till the defendant gave notice or should think proper. It remained with the plaintiff more than two years. The Court considered no writing to be necessary to prove the agreement ; and *Erle*, J., said, the treaty certainly did once contemplate the endurance of the contract for the child's maintenance beyond a year ; but the ultimate contract was, that the period should be as long as the defendant should think proper.

Thus, also it is held that, where it appears not to have been the intent of the parties that the agreement should extend beyond a year, although it might extend far beyond that time, it need not be in writing ; but where it appears to be the intent of the parties that the agreement shall not be performed within one year from the making, it must be in writing, although determinable upon a contingency, within a year. Therefore, where by the terms of the contract it was to last for a longer period than a year, a custom by which it might be put an end to by one of the parties within that

period, does not take it out of the operation of the statute (*q*). In like manner an undertaking to pay an annuity for life must be in writing, although it may terminate by death within a year (*r*). And where a person having been the defendant's traveller since 1852, entered, in October, 1854, into a fresh agreement at an increased salary, whereby either party was to be at liberty to determine the agreement by giving the other three months' notice before 1st Sept., 1855, otherwise they were to go on for another year from that time; this stipulation for its determination did not take it out of the statute. In truth, said *Alderson, B.*, this contract is not incapable of being performed within a year; it may be more truly said that it is liable to be defeated within that time. In its original conception it is a contract for more than a year. A tenancy from year to year, with power to determine it within the year, is still a tenancy from year to year (*s*).

Where, however, all that is to be done by one party, as the consideration for what is to be done by the other, actually is done within the year, the statute does not prevent that party suing the other for the non-performance of his part of the contract. Where the one has had the full benefit of the contract, the law will not permit the other to withhold

(*q*) *Birch v. Earl of Liverpool*, 9 B. & C. 392. 452.

(*s*) *Dobson v. Collis*, 25 L. J.

(*r*) *Sweet v. Lee*, 3 M. & G. (Ex.) 267; 1 H. & N. 81.

the consideration. As, where a landlord had agreed to lay out £50. on improvements on the premises demised, and the tenant, in consequence, to pay £5. a-year additional rent for the remainder of his term, of which there were several years, and the landlord laid out the £50. within the year, he was allowed to recover the additional rent, although the agreement was not in writing (*t*); for this enactment applies only to contracts not *to be* performed on either side within the year. Therefore, in a case where the defendant, in a letter signed by him, proposed to the plaintiff that she should assign to the defendant, in trust for an institution managed by him, a patent which she had obtained for making toys, such patent to be used by the institution, the plaintiff to have 5 per cent. on the profits, and the defendant to provide for the next payment in respect of the patent; and if the payments made should not equal a certain sum in the first and subsequent years, the plaintiff to have the right to reclaim the patent, and this proposal was accepted by the plaintiff by word of mouth; it was held that the contract did not require to be in writing under the 4th section of the Statute of Frauds, inasmuch as all that was to be done by the plaintiff as the consideration of defendant's promise was capable of being done within a year, and it did

(*t*) *Donellan v. Reed*, 3 B. & v. *Heming*, 4 Ex. 631. See Ad. 899; *Souch v. Straw-bridge*, 2 C. B. 808; *Cherry Nunn v. Fabion*, 35 L. J. (Ch.) 140.

not appear that any part of it was to be postponed until after a year (u).

Recapitulation
of Lectures.

I have now gone through the five cases to which the 4th section of the Statute of Frauds applies, and in which it requires a written memorandum of the contract. There are one or two cases of very considerable importance in practice on which I shall briefly observe in the next Lecture, in which a writing is required by the express enactment of the legislature. Having mentioned them, I shall say something of the *consideration* upon which a simple contract may be grounded, and which is, as you are aware, an essential part of every such contract; and then, having finished the remarks I had to make on Simple Contracts exclusively, shall resume the consideration of the general law of contracts, and shall speak of the *competency* or *incompetency* of the contracting parties, and of *remedies* by which, in case of breach of contract, their performance is to be enforced.

(u) *Smith v. Neale*, 26 L. J. (C. P.) 143; 2 C. B. (N. S.) 67.

LECTURE IV.

SALE OF GOODS, ETC., UNDER THE 17TH SECTION OF THE STATUTE OF FRAUDS.—CONSIDERATION OF CONTRACTS BY DEED AND OF SIMPLE CONTRACTS.

I CONCLUDED in the last lecture the consideration of the five cases in which the 4th section of the Statute of Frauds renders it necessary that a contract should be reduced into writing. There are, as I then said, a few other cases, which, being of constant occurrence, it will be right to specify before proceeding to the next branch of the subject.

The first of these cases is that of a sale for the price of £10 or upwards, regarding which the 17th section of the Statute of Frauds has provided as follows:—

Sale of goods
of value of £10.
or upwards—
Sect. 17.

“No contract for the sale of any goods, wares, or merchandizes for the price of £10. or upwards shall be good, except the buyer shall accept part of the goods so sold, and actually receive the same; or give something in earnest to bind the bargain, or in part payment; or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such

contract, or their agents thereunto lawfully authorised."

As to the subject-matter of this section there is little difficulty in applying it. As to the case of growing crops, and trees, and roots, &c., in the ground, the law has been already considered in treating of the 4th section, see page 109. It has been decided that shares in railway and other joint-stock companies are not an interest in land within the 4th section of the Statute of Frauds; nor are they goods, wares, or merchandizes, within the 17th (a).

The first great difference which you will observe between this section and the 4th section of the same Act is, that the 4th section renders a writing necessary in *all cases* which fall within its terms; whereas the 17th mentions three circumstances, any one of which it directs shall be as effectual as a writing, namely, *acceptance of any part of the goods, payment of part of the price*, and, lastly, the *giving something by way of earnest* to bind the bargain, or in part payment; any one of which three things will as effectually perfect the sale as a writing would. Where none of these has taken place, a writing, however, becomes necessary; and if there be none, the *bargain is void*, and there is

(a) *Humble v. Mitchell*, 11 A. & E. 205; *Bradley v. Holdsworth*, 3 M. & W. 422; *Bowlby v. Bell*, 3 C. B. 284; *Knight v. Barber*, 16 M. & W. 66; *Tempest v. Kilner*, 3 C. B. 249. See *Baxter v. Brown*, 7 M. & G. 198.

no sale: for, to use the words of Mr. J. *Bosanquet* in *Laythoarp v. Bryant* (b), "the 4th section does not avoid contracts not signed in the manner described; it only precludes the right of action. The 17th section is stronger, and *avoids* contracts not made in the manner prescribed." A parol sale, therefore, unaided by any of the three formalities mentioned in the 17th section as equivalent to writing, is totally and entirely void. A doubt was entertained at one period whether the 17th section included the case of a contract for something not in existence in a chattel state at the time of making the bargain, but which was to become a chattel before the time agreed upon for its delivery (c). Where, for instance, growing timber was bargained for, to be delivered cut into planks, or a ship or a carriage not yet built. However, any doubt that formerly existed on this subject is now put an end to; for, by statute 9 Geo. 4, c. 14, s. 7, it is enacted that the 17th section of the Statute of Frauds "shall extend to all contracts for the sale of goods of the value of £10. sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not, at the time of such contract, be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery." These two

(b) 2 Bing. N. C. 735.

(c) *Lee v. Griffin*, 30 L. J. (Q. B.) 252.

statutes, according to a well-known rule, are to be read as incorporated together (*d*); one effect of which is that the 17th section of the Statute of Frauds must be read as applying to all goods, &c., of the *value* of £10., instead of the *price* to that amount (*e*).

Where a writing is relied on to satisfy the provisions of the 17th section, the rules which govern the case are very analogous to those which I have already stated with regard to the 4th. The signature must be by the party to be *charged* or his agent. And one party cannot be the other's agent for this purpose (*f*). Nor can the agent of the party complaining of a breach of the contract signing a memorandum of the bargain at the request of the party to be charged, be considered as the agent of the party to be charged (*g*). But under neither the 4th nor the 17th section is there any necessity for the agent's being appointed by writing.

Several documents may be read together.

Under the 17th section, too, as well as under the 4th, several documents may be read together as making up the contract, provided they be suffi-

(*d*). *Scott v. Eastern Counties Railway*, 12 M. & W. 33; *Harman v. Reeve*, 25 L. J. (C. P.) 257; 18 C. B. 587.

(*e*) *Harman v. Reeve*, *supra*.

(*f*) *Wright v. Dannah*, 2 Camp. 203; *Farebrother v. Simmons*, 5 B. & Ald. 333.

(*g*) *Graham v. Musson*, 5 Bing. N. C. 603; *Graham v. Fretwell*, 3 M. & G. 368. See *Bird v. Boulter*, 4 B. & Ad. 443, *post*; and *Meus v. Carr*, 26 L. J. (Ex.) 39; 1 H. & N. 484.; *Durrell v. Evans*, 30 L. J. (Ex.) 254.

ciently connected in sense among themselves without the aid of parol evidence (*h*). And in such cases, as different phrases are commonly used in the different documents, it is peculiarly important to ascertain that both parties mean the same thing ; as where there was a treaty for the sale of a horse, and one wrote that he would buy him if warranted sound and quiet in harness, and the other wrote that he would warrant him sound and quiet in *double-harness*, it was considered by the Court that the parties never had contracted in writing *ad idem*, and, consequently, that the statute had not been complied with (*i*).

The defendants wrote to the plaintiffs offering them a certain quantity of "good," barley upon certain terms, to which the plaintiffs answered, after quoting the defendant's letter, as follows:—"Of which offer we accept, expecting you will give us fine barley and full weight." The defendants, in reply, stated that their letter contained no such expression as *fine* barley, and declined to ship the same. Evidence was given at the trial that the terms "good" and "fine" were terms well known in the trade, and the jury found that there was a distinction in the trade between "good" and "fine"

(*h*) *Smith v. Surman*, 9 B. & W. 155 ; *Hutchison v. & C.* 561 ; *Archer v. Baynes*, 5 Ex. 625 ; *Phillimore v. Barry*, 1 Camp. 513 ; *Jackson v. Lowe*, 1 Bing. 9. *Bowker*, 5 M. & W. 535. See *Sivewright v. Archibald*, 17 Q. B. 103 ; 20 L. J. (Q. B.) 529.

(*i*) *Jordan v. Norton*, 4 M.

barley. Held, that although it was a question for the jury what was the meaning of those terms in a mercantile sense, yet, that they having found what that meaning was, it was for the Court to determine the meaning of the contract, and the Court held that there was not a sufficient acceptance (*k*).

It need hardly be added that although it appears that there are several memoranda of the contract, it will not be presumed that they differ; but on the contrary, if any one of them contain enough to show the contract, it is a sufficient memorandum within the statute. Therefore, in an action by the vendor against the purchaser of goods, a note signed by a broker acting for both parties, expressing that the broker had "sold" specified goods at a specified rate, and containing all the terms of the contract (which, from containing the word sold, is called in commerce the sold note, and should, in fact, correspond with another also signed by the broker and called the bought note), was sufficient to satisfy the statute. "If in ordinary practice" said *Willes, J.*, "the bought and sold notes were different things, there might be some ground for the defendant's argument, but it is well known that in ordinary practice they are identical—the one being a copy of the other; and, therefore, it would be a violent presumption to assume in favour of the defendant that the bought note was a different one

(*k*) *Hutchison v. Bowker*, 5 M. & W. 535.

from the sold note. The sold note is to be presumed, until the contrary is shown, to represent the contract between the parties" (l).

It was said by Lord *Ellenborough*, in *Egerton v. Matthews* (m), that the word *bargain*, used in this section, does not render so strict a statement of the transaction necessary, as the word *agreement*, used in the 4th, does of matters within that section. It has, however, been decided that the names of both parties must appear in the memorandum, though the signature of the party to be bound alone is requisite; for, as the Court observed, there cannot be a *bargain* without two parties, and therefore a memorandum naming one only is not a memorandum of a bargain (n). And the price ought to be stated if one was agreed on, for that is part of the bargain (o). A memorandum is not sufficient that does not mention price, if an agreement has been come to on that point. Thus, when the seller showed the buyer a list of prices, and the buyer only agreed to purchase on condition of a deduction of £25. per cent. from such prices for cash payment, and then wrote an order for certain of the articles, not specifying anything as to price; this was held

What the memorandum must contain.

(l) *Parton v. Crofts*, 33 L. J. (C. P.) 189.

(m) 6 East, 307.

(n) *Champion v. Plummer*, 1 B. & P. (N. R.) 252; *Williams v. Lake*, 29 L. J. (Q. B.)

1.

(o) *Elmore v. Kingscote*, 5 B. & C. 583; *Hoadley v. M'Laine*, 10 Bing. 482; *Vandenberg v. Spooner*, 35 L. J. (Ex.) 201, s. 9; See *Newell v. Radford*, 37 L. J. (C. P.) 1.

not enough to satisfy the statute, and a subsequent letter from him declining to take the goods, was deemed also insufficient to take the case out of the statute (*p*). If none be named, the parties must be understood to have agreed for what the thing is reasonably worth (*q*). Thus, an order for goods "on moderate terms" is a sufficient memorandum within the 17th section of the Statute of Frauds (*r*). A contract for the sale of goods of the value of £10. is within the 17th section, although it includes other matters for which a writing is not necessary (*s*). And if the memorandum contains all that was to be done by the party sought to be charged, it has been held sufficient (*t*). But it is important to be borne in mind that in construing these memoranda the surrounding circumstances may be considered, which often make that quite plain which would be obscure without them (*u*).

Repudiation.

A curious question has recently been decided, whether a memorandum is sufficient which contains all the terms of the bargain, and acknowledges it to have been made, but at the same time repudiates

(*p*) *Goodman v. Griffiths*, 26 587; *Watts v. Friend*, 10 B. L. J. (Ex.) 145; 1 H. & N. & C. 446.
574.

(*q*) *Fulpy v. Gibson*, 4 C. & L. J. (C. P.) 78; 1 C. B. B. 837. (N. S.) 188; *Egerton v. Mat-*

(*r*) *Ashcroft v. Morrin*, 4 *thews*, 6 East, 307.
M. & Gr. 450.

(*s*) *Harman v. Reeve*, 25 L. J. (C. P.) 1.
L. J. (C. P.) 257; 18 C. B.

(*u*) *Newell v. Radford*, 37

the contract. In this case the purchaser of goods wrote to the seller, referring to all the material terms of the contract, but stating that he had never received the goods, and declined to do so because they had been damaged by the carrier before they reached him. The Court of Common Pleas considered that the former part of the letter contained a memorandum of the contract, which was all which was required by the statute ; and that the existence in the same writing of the refusal to abide by the bargain did not neutralise the acknowledgment (x). But although the statute invalidates all contracts for the sale of goods unless in writing, or unless the buyer accept the goods, or give earnest, or pay in whole or part, and therefore virtually and in effect forbids their being in any way varied or altered by parol (y) ; yet it does not forbid their being rescinded by parol ; and there is no doubt that they may be so rescinded (z).

Alteration or
rescission.

Another case, in which the legislature has required that a particular contract shall be in writing, is that of *an infant*. There are many contracts which, when entered into by an infant under the age of twenty-one years, are invalid, as I shall

Ratification of
promises by
infants and
others.

- | | |
|----------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------|
| (x) <i>Bailey v. Sweeting</i> , 30 L. J. (C. P.) 150 ; <i>Wilkinson v. Evans</i> , 35 L. J. (C. P.) 224. | <i>Moore v. Campbell</i> , 23 L. J. (Ex.) 310 ; <i>Noble v. Ward</i> , 33 L. J. (Ex.) 81 ; 36 L. J. (Ex.) 91, in Ex. Ch. |
| (y) <i>Harvey v. Grabham</i> , 5 A. & E. 61 ; <i>Marshall v. Lynn</i> , 6 M. & W. 109 ; <i>Stead v. Dawber</i> , 10 A. & E. 57 ; | (z) <i>Ibid.</i> See <i>Goss v. Lord Nugent</i> , 5 B. & Ad. 58. |

have occasion to explain to you at greater length when I arrive at that part of the subject which relates to the *competency* of parties to contracts, but which are capable of being ratified by the infant when he arrives at his full age of twenty-one. This ratification might, at common law, have been by parol; but, by 9 Geo. IV. c. 14, s. 5, no action shall be maintained whereby to charge any person upon any promise made *after full age* to pay any debt contracted *during infancy*, or upon any ratification after full age of any promise or simple contract made during infancy, *unless* such promise or ratification be in *writing*, signed by the party to be charged therewith. In the construction of this Act, it has been considered, that any written instrument, signed by the infant, who has attained his majority, will amount to a ratification of an act done by himself while an infant, provided it be such as, in the case of an adult, would amount to an adoption of the act, had it been that of an agent (*a*). And, therefore, where the defendant wrote to the plaintiff thus:—"I am sorry to 'give you so much trouble in calling, but am not prepared for you, but will without neglect remit you in a short time," but the note contained no address, date, or amount, it was held to be sufficient, and that these omitted parts might be supplied by parol (*b*). In an action by drawer against acceptor of a Bill of Exchange

(*a*) *Harris v. Wall*, 1 Ex.
122.

(*b*) *Hartley v. Wharton*, 11
A. & E. 934.

for £101, defendant proved that he was under age when he accepted the bill. Plaintiff then produced in evidence a letter in defendant's hand-writing, purporting by its date to be written after he came of age, addressed to a third person in these words :—“I request you to pay H. (the plaintiff) £101 at your earliest convenience after the date of this letter, from the money left me by my late grandfather, for which I have given my bill.” This was held to amount to a ratification of the original promise to pay (c). But the defendant having, whilst an infant, accepted a Bill of Exchange, was applied to after he became of age, on behalf of the holder, and then wrote to him as follows :—“Your brother tells me you are very uneasy about the £500. drawn by Mr. P. upon me. Pray make yourself easy about it, as I will take care that it is paid, and Sir Henry P. comes to England in June.” Held, per *Parke*, B., and *Alderson*, B., that this was not a ratification to take the case out of the statute 9 Geo. IV., c. 14, but, per *Platt*, B., and *Martin*, B., that it was a ratification. And *Parke*, B., said : “It amounts to nothing more nor less than an assurance that the plaintiff may be calmed in his feelings on the assurance that this Bill will be sure to be paid, and points to the arrival of Sir Henry P. in England in June” (d). It is worthy of being observed, that this statute

(c) *Hunt v. Massey*, 5 B. & Ad. 902.

(d) *Mason v. Blane*, 23 L. J. (Ex.) 342 ; 10 Ex. 206.

seems to exclude the signature of an agent, and to require that of the infant himself (*e*).

Insurance. All contracts of insurance must also be printed or written, whether the contract be a marine, fire, or life insurance (*f*).

British ships. Another important class of contracts is also required to be in writing, viz., the conveyance of property in British ships, and contracts for such conveyance. By the Merchant Shipping Act, 1854 (17 & 18 Vict. cap. 104), s. 55, sched. E, every transfer of a registered ship to a person qualified to be owner of a British ship, shall be by Bill of Sale according to a prescribed form. It must also be under seal, and executed in the presence of at least one witness.

**Debt barred
by Statute of
Limitations.**

Another case is that of a promise to pay a debt barred by the Statute of Limitations; but, as I shall have occasion to speak again of that statute before the conclusion of these lectures, I shall reserve what I have to say regarding the writing by which its operation may be defeated.

Now, these are the principal cases in which the law of England requires that particular contracts should be reduced into writing; not that they are the only ones, for there are many statutes making writing necessary in certain particular transactions,

(*e*) *Hyde v. Johnson*, 2 Bing. N. C. 776. See 7 M. & G. 88. Sea. See 14 Geo. III., c. 78, Fire; and 14 Geo. III., c. 48, Life.

(*f*) 35 Geo. III., c. 63, s. 2.

but these are the cases of most frequent occurrence, and therefore fittest to be here mentioned.

Having now, therefore, pointed out to you the practical distinction which exists between written and parol contracts, though both of them alike, if not sealed and delivered, rank but as *simple contracts*, it is time to touch on some points which apply to all simple contracts alike.

Points
applying to
all simple
contracts.

The first point to be remarked will, perhaps, at first sight, be considered as nearly self-evident, but much difficulty does, in fact, arise, from not attending to it ; and, upon a little consideration, it will appear important to be borne in mind : it is this, that the parties to the contract must mutually assent to the same thing (*g*).

Assent of the
parties must
be to the same
thing.

The following memorandum is a good example of this rule : “ I, William Bradley, do agree that I will work for and with John Sykes, of Sheffield, manufacturer of powder-flasks and other articles, at and in such works as he shall order and direct, and no other person whatever, from this day henceforth during and until the expiration of twelve months, and so on from twelve months to twelve months, and until I shall give the said John Sykes twelve months’ notice in writing that I shall quit his service.” This contract, it will be observed, is one which, by the Statute of Frauds, cannot be made

(*g*) See *Jordan v. Norton*, 396 ; *Felthouse v. Bindby*, 31 4 M. & W. 155, ante ; *Forster v. Rowland*, 30 L. J. (Ex.) L. J. (C. P.) 204.

available unless it is in writing, and it is equally observable that there is nothing in the agreement to bind John Sykes to employ William Bradley, and, therefore, when the defendant was sued by Sykes for harbouring Bradley, as having unlawfully left his service, he was held not entitled to sue, for want of mutuality in his agreement with Bradley (*h*).

“A contract,” says Pothier, “includes a concurrence of intention in two parties, one of whom promises something to the other, who on his part accepts such promise.” Hence, assent or acceptance is indispensable to the validity of every contract; for, “as I cannot,” continues Pothier, “by the mere act of my own mind transfer to another a right in my goods, without a concurrent intention on his part to accept them, neither can I by my promise confer a right against my person until the person to whom the promise is made has, by his acceptance of it, concurred in the intention of acquiring such right.” Wherever there is not an assent, express or implied, to the terms of the proposed contract by both parties, there is no mutuality, and no contract. Thus, where the declaration stated that J. A. was indebted to the plaintiff, and that the defendant’s agent, by written instrument, promised the plaintiff as follows—“Mr. A., the defendant, offers to pay a composition of 7s. in the £ on your

(*h*) *Sykes v. Dixon*, 9 A. & E. 693.

account against his nephew, J. A., on your giving proper indemnification to both. In the event of your accepting the offer I will thank you to forward me full particulars of your account, in order that the same may be properly examined ;” that the plaintiff accepted the offer of the defendant, and forwarded the full particulars of his account, and had always been ready and offered to give a proper indemnification to J. A. and the defendant, yet the defendant did not pay the composition : this declaration was held bad upon demurrer, as being nothing more than an overture. Indeed, the very leaving of the terms of the indemnity open shows it to be incomplete. Clearly the defendant never intended to pay unless he got such an indemnity as he should think proper, not what the plaintiff or a third person should think sufficient (i).

The assent to a contract must be to the precise terms offered. Where one party proposes a certain bargain, and the other agrees subject to some modification or condition, there is no mutuality of contract until there has been an assent to it so modified ; otherwise it would not be obligatory on both parties, and would therefore be void (k).

(i) *Cope v. Albinson*, 22 L. J. (Ex.) 37 ; 8 Ex. 185 ; *M'Iver v. Richardson*, 1 M. & S. 557 ; *Mozley v. Tinkler*, 1 C. M. R. 692 ; *Russell v. Thornton*, 29 L. J. Ex. 9 ; 30 L. J. (Ex.) 69 ; see the judgment of Kindersley, V. C., in *Re Leeds Banking Company*, 35 L. J. (Ch.) 75 ; *Oriental Island Steam Company v. Briggs*, 31 L. J. (Ch.) 241.

(k) *Jordan v. Norton*, 4 M. & W. 155 ; *Cooke v. Oxley*, 3

There is a clear distinction between a mere proposal and an agreement to sell. As in *Cooke v. Oxley*, where the defendant offered goods to the plaintiff and gave him till four o'clock in the afternoon, the plaintiff did not within the time express that he acceded to the proposal, and was therefore held not entitled to sue the defendant for non-delivery of the goods. The engagement was all on one side, and the defendant had a right until four o'clock to sell the goods to any other person (1). In like manner, where a broker sold on Saturday certain goods of the defendant to the plaintiff, subject to the plaintiff's approval of the quality on Monday, and sent the sold note to the plaintiff on Saturday marked with the words "quality to be approved on Monday," and the plaintiff not having approved or disapproved on the Monday, the broker, a few days after, sent the sold note to the defendant with those words struck out, and the defendant then repudiated the engagement; it was held that he had no right to do so, for the plaintiff, not having signified his disapproval on Monday, was then bound by it, and the engagement, being mutual, was a perfect contract. This case, it will be observed, differs from *Cooke v. Oxley*, which was an offer to sell not accepted within the time given. Here was not merely an offer to

T. R. 653; *Re Leeds Banking Company ex parte Malione*, 36 L. J. (Ch.) 141; *Re Universal Banking Corporation ex parte Gunn*, 37 L. J. (Ch.) 40; *Re Saloon Steam Packet ex parte Fletcher*, id. 49.
(1) 3 T. R. 653.

sell, but the buyer had an option of renouncing the purchase on Monday, and not having renounced, the contract had become absolute (*m*). The case of *Routledge v. Grant* (*n*) is also a good example of this principle. Grant offered to purchase Routledge's house, requiring possession on the 25th of July, and a definite answer in six weeks; Routledge accepted the offer, with possession on the 1st of August; Grant afterwards, within the six weeks, retracted his offer, and it was held that he had a right to do so.

The party who made the offer has a right to say, "*Non hæc in fœdera veni;*" and to decline any other bargain than that which he offered. Where an offer is accepted in the terms in which it was made, the contract is binding on both parties. At any time before it is accepted the offer may be rescinded, but not afterwards (*o*). The importance of ascertaining accurately that the offer which the one party has made has not been altered by any term or stipulation introduced by the other in accepting it, is so great, that another example or two will be useful. Thus, a broker sold to Cowie, of Calcutta, a quantity of indigo, and drew up a sold note addressed to the vendor, who having objected to a particular word, Cowie struck his pen through it, placing his initials over the erasure, and returned it

(*m*) *Humphries v. Carvalho*, 16 East, 45. (*o*) *Cooke v. Oxley*, 3 T. R. 653.

(*n*) 4 Bing. 653.

to the broker, who delivered it so altered to the vendor. The broker afterwards delivered to Cowie a bought note which differed materially from the sold note. In an action brought by the vendor against Cowie for non-performance of the contract as stated in the sold note, the Supreme Court at Calcutta considered that the sold note formed the contract, and found for the plaintiff; but the judicial committee of the Privy Council, upon appeal, considered that the parties intended the bought and sold notes together to form the agreement between the parties, notwithstanding Cowie's alteration of the sold note, and consequently, that there being a material variation in the terms of the bought and sold notes, they did not together constitute a binding contract (*p*). In another case, a broker, acting for the plaintiff, verbally contracted to buy certain hemp of the defendant, and sent him a note stating the terms, commencing thus:—"Sold, for Campbell (the defendant), to Moore (the plaintiff), 50 tons of Petersburg clean hemp, ex G. G. to arrive, at £34. per ton, payment at the option of the buyer by acceptance on London at six months from delivery, or cash in 14 days less 2½ per cent., to be taken from the quay at the landing weights, and to be a fair average quality of the season." The defendant sent back another note in these words:—"I have this day sold, through you, to M.,

(*p*) *Cowie v. Remfry*, 5 Moore (P. C.) 232.

50 tons Petersburg clean hemp, expected to arrive per G. G., at £34. per ton from the quay. If the ship is lost, or the hemp damaged on the voyage, this contract to be considered void for such quantity as may be lost or damaged. The quality to be of an average of the season, and if any dispute arises, the same to be settled by arbitration. Payment, six months' acceptance, or cash in 14 days less $2\frac{1}{2}$ per cent. discount, at the buyer's option. Customary allowances." The plaintiff sued for non-delivery of the hemp, treating the note signed by him as the contract, and the Court of Exchequer held that the liability of the defendant depended upon the question of fact, whether the note signed by him was intended by both parties to be the contract, in which case he would be liable, or whether the defendant only intended to be bound as the seller, provided the plaintiff should also sign a note to bind himself as the buyer (*q*). It is obvious, if this were a case in which the plaintiff sought to prove a contract by means of bought and sold notes, made by a broker for both parties, he must have failed, for the two notes disagree, and there would have been no valid contract. This, however, is not the case of a contract entered into by a broker for the buyer and seller ; the person who made the contract was, indeed, a broker, but he acted solely for the plaintiff. The plaintiff then insists that the note

(*q*) *Moore v. Campbell*, 23 L. J. (Ex.) 310 ; see *Heyworth v. Knight*, 33 L. J. (C. P.) 298.

signed by the defendant is the contract, and if it be true that this was intended by both parties to be the contract between them, the defendant would be bound as a party to be charged, and the memorandum would be sufficient within the Statute of Frauds; but if Campbell, the defendant, never intended to be bound as the seller unless Moore was also bound as the buyer, and meant that Moore should sign the note on his part to bind him, then there was no valid contract between them. Contracts are very frequently made by letters, which are usually sent by the post, the one party offering a contract, and the other accepting it, either absolutely, or with modifications, or altogether refusing it. In these cases the offerer must be considered as making during every instant of the time his letter is travelling the same identical offer to the receiver (*r*). In like manner the receiver's acceptance of the contract is complete when in due time he sends his answer. This due time is ascertained by the usage of trade, by the actual stipulation of the parties, or by what is a reasonable time under the circumstances (*s*). It is clear that neither party is exonerated by any irregularity in the post-office. If he were no one could safely avail himself of that mode of transmission (*t*). A person putting into the post a letter declaring his acceptance of a contract

(*r*) *Adams v. Lindsell*, 1 B. 25 L. J. (Ch.) 259.
 & A. 681. (*t*) *Stocken v. Collen*, 7 M.
 (*s*) *Id. Meynell v. Surtees*, & W. 515.

has done all that is necessary for him to do, and is not answerable for casualties occurring at the post-office. In the case from which this last proposition is taken, an offer had been made by a house at Glasgow of 2000 tons of iron to a house at Liverpool. The latter answered the offer by a letter saying we will take the 2000 tons of iron you offer us. The letter was put into the post-office at Liverpool on the 30th of January, and, in regular course, ought to have been delivered at Glasgow on the 31st; but on account of the state of the roads, it was not delivered till the 1st of February. The House of Lords held that, having been posted on the proper day, it was accepted in due time, and the sellers were bound by their offer (*u*). It is obviously involved in the state of law just described, that, until acceptance, the offerer may revoke his offer (*x*). The necessity of completeness in this matter has been strongly shown in many recent cases on contracts for the purchase of railway scrip. These contracts are often made by letters, the intended purchaser applying by letter for shares, and the answer, after complying with this request, going on to stipulate that the shares should not be transferable, or adding some term not contemplated by the applicant (*y*). Thus, the intended

(*u*) *Dunlop v. Higgins*, 1 Bing. 653; *Warner v. Harrison*, 28 L. J. (Q. B.) 18.
H. of L. C. 381.

(*x*) *Cooke v. Oxley*, 3 T. R. 653; *Routledge v. Grant*, 4 B. 404; *Wontner v. Shairp*, 4 C. 653; *Walstab v. Spottis-*

allottee offered to buy and to pay for his shares ; but the allottees added a proviso. To this additional stipulation there was often no assent, and the contract was therefore void ; and no such allottee could have been sued upon the transaction, for the stipulation was clearly not implied in the agreement to take the shares. Pothier says, " the allowance of a certain time for paying money due, the liberty of paying it by instalments, &c., and the like, are *accidental to the contract*, because they are not included in it without being particularly expressed " (2).

The consideration of contracts.

I have already stated to you that one of the main distinctions between a contract by *deed* and a simple contract is, that *the latter requires a consideration to support it*, the former not. And here it is proper to observe, incidentally, that when I say that a contract by deed does not require a consideration to support it, I mean to say that it does not require a consideration for the purpose of binding the party who executes it, and rendering him liable. I do not by any means intend that you should understand that a consideration may not come to be a most important ingredient in a contract by deed, as between parties claiming a benefit under that deed and other parties having

Wood, 15 M. & W. 501 ; *Volans v. Fletcher*, 1 Ex. 20 ; *Duke v. Andrews*, 2 Ex. 290 ; *Chaplin v. Clarke* 4 Ex. 403 ; *Re Direct Birmingham Railway Company, ex parte Capper*, 19 L. J. (Ch.) 394. (2). 1 Evans' Pothier, 8.

conflicting claims upon the person executing it. For instance, the statute of the 13th Eliz. c. 5, renders a great variety of deeds (if made without a valuable consideration) void as against creditors; and this statute (which Lord Mansfield has said is only declaratory of the Common Law) is founded on a perfectly righteous and equitable principle; for how absurd and unjust would it be to allow a man to defeat the claims of his real creditors by entering into obligations to persons who had never parted with any value at all. When, therefore, I say that a deed is good *without consideration*, I do not mean to say that it stands for all purposes on the same footing as an instrument for which value has passed; but what I mean that you should understand is this—that, where the interests of third parties are not affected, but the question is between the person who entered into the contract, and the person with whom it is made, there a man cannot defend himself against a promise made by deed, by saying that he received no consideration for it, although he might defend himself upon that ground against the very same promise if it had been made by simple contract. I cannot, I think, put a better example of this than that which I put in a former lecture:—A. owes B. £50. Now, if I write upon a piece of paper as follows:—

“I promise A. that I will discharge for him the debt due from him to B.”

and gave him the paper so written, here is a simple contract without any consideration for it ; and, if I fail to perform the promise, no action will lie against me, because a simple contract founded upon no consideration cannot be enforced : and yet, if I had sealed that very slip of paper, and delivered it to A. as my act and deed, an action of covenant would have lain against me had I afterwards failed in performing it ; and to that action it would have been no defence to say that I received no consideration for my undertaking : I might say, that I had been imposed upon, and persuaded to execute it by A.'s fraud ; or I might say, that the debt due to B. was an illegal one, and that my promise was made in pursuance of an illegal arrangement ; but that the promise was without consideration would be a defence of which, the contract being by deed, I could not be allowed to avail myself.

Of promises
made to the
debtor to pay
his debt.

Here I am tempted to digress for a moment or two from the main course of the subject, for the imaginary case I have first put reminds me of a real and a very curious point which has been recently decided in the Court of Queen's Bench (a). The case I put, you will observe, was this :—A. owes B. £50. I write and sign a sheet of paper in these words :—

“I promise A. to discharge *the debt due from him to B.*”

(a) *Eastwood v. Kenyon*, post.

Now, this promise, if I have received no consideration for it, is, as I have said, merely void. But suppose I *have* received a consideration for it,—will it be binding on me then? Suppose, for instance, A. has given me a horse or a diamond ring as a consideration for my undertaking the responsibility,—can my promise be enforced even in that case? Now, at the first statement of the question, I dare say that you feel surprised that it ever should have been made a question at all; but a moment's reflection will suffice to show you why it not only was a question, but a very doubtful one. The 4th section of the Statute of Frauds, you will remember, among the five sorts of *agreement* which it directs should be evidenced by writing, comprehends *any promise to answer for the debt of another*. Now, in the case I have been putting there is a debt due from A. to B., and my promise is a promise to A. to pay it; and, though I have supposed the promise to be in writing, and signed, and to be founded upon a sufficient consideration—say the horse or the ring—still it is not such a writing as would satisfy the Statute of Frauds, for that writing, as I showed you in former lecture from the authorities, must, before the stat. 19 & 20 Vict. c. 97 (b), have shown the consideration as well as the promise; and in the case which I have put, the writing simply contains a signed promise to A. to discharge

(b) See ante, p. 94.

his debt to B., but neither expressly nor impliedly mentions or alludes to any consideration at all. If, therefore, the case be within the Statute of Frauds, no action was maintainable upon that promise, although founded upon a good and valuable consideration; so that the question, you see, reduces itself simply to this point,—is such a promise, that is, is a promise to pay another man's debt, made, not to the person to whom it is due, but to the debtor himself, a promise to answer for the debt of another within the *meaning* of the 4th section of the Statute of Frauds—I say, within the *meaning*, for that it comes within the *words*, literally understood, is obvious.

It is a singular thing that this question never should have received a judicial decision until it came before the Court of Queen's Bench a short time since, in the case of *Eastwood v. Kenyon*, which is now reported in 11 Ad. & Ell. 438. In that case, the plaintiff was liable to a Mr. Blackburne on a promissory note, and the defendant promised *the plaintiff* to discharge the note to Blackburne. The Court held, that this was not a promise to answer for the debt of another within the meaning of the 4th section of the Statute of Frauds.

“If,” said Lord *Denman*, “the promise had been made to Blackburne, doubtless the statute would have applied; it would then have been strictly a promise to answer for the debt of another; and the argument on the part of the defendant is, that it is

not less the debt of another because the promise is made to that other, viz., the debtor and not the creditor, the statute not having in terms stated to whom the promise contemplated by it is to be made. But upon consideration, we are of opinion, that the statute applies only *to promises made to the person to whom another is answerable*. We are not aware of any case in which the point has arisen, or in which any attempt has been made to put that construction upon the statute which is now sought to be established, and which we think not to be the true one." The law no longer requiring the consideration of a guaranty to be in writing, this case is no longer valuable for the point upon which it was originally quoted, but as it shows that such a promise need not be in writing at all, it has been retained in the text.

To return to the subject from which I digressed for the purpose of mentioning this point, and the decision upon it.—A simple contract is, as I have said, incapable of becoming the subject of an action unless supported by a consideration. *Ex nudo pacto non oritur actio* is an old and well-established maxim of our law, as well as of the civil law, and has been illustrated by a great variety of cases from time to time (c): thus it has been laid down by Lord Kenyon (d), that a promise made by the cap-

Maxim of
nudum pac-
tum.

(c) *Westhead v. Sproson*, 30 72; *Harris v. Carter*, 23 L. J.
L. J. (Ex.) 265. (Q. B.) 295; 3 E. & B. 559.

(d) *Harris v. Watson, Peake*, See *Clutterbuck v. Coffin*, 3

tain of a ship to one of his seamen, when the ship was in extraordinary danger, to pay him an extra sum of money as an inducement to extra exertion, was a void promise ; because every seaman is bound to exert himself to the utmost for the safety of the ship, and therefore the captain would get nothing from the seaman in exchange for his promise except that which the seaman was bound to do before. And very recently the Court of Exchequer has held, that interest, being by mercantile usage payable upon balances, an agreement in consideration of interest upon a balance to give an extended time for paying it, was merely void (*e*). The documents put in by the defendant, said *Parke*, B., show that interest was payable at the time of the contract, and therefore there was no consideration for that contract.

Reason of the rule.

The reason for the strictness with which this rule of law—that there must be a consideration to support a simple contract—is enforced, is, to guard persons against being drawn hastily and inconsiderately into engagements which may prove ruinous to them. The law does not absolutely prohibit them from contracting a gratuitous obligation, for they may, if they will, do that by deed ; and it is thought that, a deed being an instrument requiring more of ceremony and formality, and sealing being considered all over Christendom as

M. & G. 842 ; *Hartley v.* (e) *Orme v. Galloway*, 23
Ponsonby, 26 L. J. (Q. B.) 322. L. J. (Ex.) 118 ; 9 Ex. 544.

an act of much solemnity, and as suggesting the contract to be extraordinary and important, more opportunity for thought is afforded to the party executing it than to a person entering into a simple contract, and, consequently, that it is not unreasonable to give it a more stringent operation.

The reason of the Law of England on this point—one of the most important in our entire system—is very clearly explained in the judgment of the Court of Queen's Bench in *Eastwood v. Kenyon*, the case which I before mentioned with reference to the 4th section of the Statute of Frauds.

The Lord Chief Justice remarks, in that case, that “the eminent counsel who argued for the plaintiff in *Lee v. Muggeridge* (*f*) (who were Lord *Winfold* and Mr. Serjt. *Lens*), had spoken, in their argument, of Lord *Mansfield* as having considered the rule of *nudum pactum* too narrow, and maintained, that all promises deliberately made ought to be binding at law, as they certainly are in honour and conscience. But,” (the Chief Justice continues,) “the enforcement of such promises at law, however plausibly recommended by the desire to effect all conscientious engagements, might be attended with mischievous consequences to society—one of which would be the frequent preference of voluntary undertakings to claims for just debts. Suits would thereby be multiplied, and voluntary

(*f*) 5 Taunt. 36.

undertakings would be also multiplied, to the prejudice of real creditors. The temptations of executors would be much increased by the prevalence of such a doctrine, and the faithful discharge of their duty be rendered more difficult."

Perhaps, it may be added, that if this rule were not law, an expression of present intention, of mere good will, of no more than opinion (*g*), or even a civil and indirect refusal, would continually be made the grounds of actions; for no one can have seen much of society, or attended much in Courts of Justice, without having observed how frequently such expressions are taken by the recipient in a sense very much more favourable to his interest and wishes than they were intended by the utterer to bear (*h*).

What a
consideration
must be.

Now, with regard to the question—*What does the law of England recognise as a consideration capable of supporting a simple contract?* The best and most practical answer is,—*Any benefit to the person making the promise, or any loss, trouble, or inconvenience to, or charge upon the person to whom it is made.* Sir Wm. Blackstone, in the second volume of his Commentaries (p. 444), following the arrangement of the civilians, divides considerations into four classes: 1st. *Do ut des*, where I give something that something may be given to me;

(*g*) *Nicholson v. Ricketts*, Nature, B. 3, cap. 5; and 29 L. J. (Q. B.) 95. *Shadwell v. Shadwell*, 30 L. J.

(*h*) See Puffendorff's Law of (C. P.) 97.

2nd. *Facio ut facias*, where I do something that something may be done for me ; 3rd. *Facio ut des*, where I do something that something may be given to me ; and 4th. *Do ut facias*, where I give something that something may be done for me. Divisions of this sort are useful for the sake of arranging our ideas, and testing their clearness ; but the short practical rule is, as I have said, that *any benefit accruing to him who makes the promise, or any loss, trouble, or disadvantage undergone by, or charge imposed upon, him to whom it is made, is a sufficient consideration in the eye of the law to sustain the promise.* Thus, let us suppose I promise to pay B. £50. at Christmas. Now, there must be a consideration to sustain this promise. It may be that B. has lent me £50. : here is a consideration by way of advantage to me. It may be that he has performed, or has agreed to perform, some laborious service for me : if so, here is a consideration by way of inconvenience to him, and of advantage to me at the same time. It may be that he is to labour for a third person at my request : here will be inconvenience to him without advantage to me : or, it may be that he has become surety for some one at my request ; here is a charge imposed upon him. Any of these will be a good consideration to sustain the promise on my part. Illustrations of this rule you may collect from various instances, among which I will refer you to *Williamson v. Clements*, where the defendant being indebted to

General
definition.

the plaintiff on a bill of exchange indorsed to him, and the plaintiff having lost that bill, gave to the defendant, at his request, a bond, acknowledging that the bill was paid, and containing a condition for indemnifying the defendant against his afterwards being compelled to pay the bill; and the defendant, in consideration thereof, promises the plaintiff to pay him the amount of the bill. It will be observed, that it was a detriment to the plaintiff to acknowledge the bill to have been paid, since he thereby gave up any claim upon the bill which he might otherwise have had if he had found it (i). So in *Whitehead v. Greetham*, decided in the Exchequer Chamber (k), the declaration stated that the plaintiff had retained the defendant at his request to lay out £700. in the purchase of an annuity for him; that the defendant promised to lay it out securely, and that the plaintiff delivered him the money for that purpose; and the Court held that there was a good consideration for that promise. It was clearly a detriment to the plaintiff to part with his £700. In another instance, one Charles Kennedy being indebted to the firm of Boeme and Smout, and the plaintiff having been appointed by the Court of Chancery receiver of the debts due to the firm, in consideration that the plaintiff would give him two months' time to pay, the defendant promised the plaintiff to pay him at the expiration

(i) *Williamson v. Clements*,
1 Taunt. 523.

(k) 2 Bing. 464; *Shillibeer*
v. Glyn, 2 M. & W. 143.

of that period should Charles Kennedy not do so. Here it is observable, that the plaintiff did not interfere as a stranger in the concerns of the firm for which he was appointed receiver. It was his duty to require the debtor to pay, and the duty of the debtor to pay him. The contract, therefore, to forbear to proceed against the debtor was a contract from which the plaintiff might incur a detriment, and it is a sufficient consideration for a contract if one party receives a benefit, or the other is exposed to a detriment from it (*l*). By a similar course of reasoning, the case of *Hartley v. Ponsonby*, was decided,—a case so nearly resembling in its circumstances that of *Harris v. Watson*, recently mentioned (*m*), that many were startled by the decision, as if it had been inconsistent with the latter. A ship being on a voyage from Liverpool to Port Philip and back, when in port at P., became so short handed that it was dangerous to life to proceed with only the reduced crew. The captain being unable to procure additional hands, promised the remaining seamen who were under articles for the whole voyage, an additional sum if they would assist in taking the ship to her next port. It was held that the seamen were not bound to proceed on the voyage, as it involved risk of life, and that the

(*l*) *Willatts v. Kennedy*, 8 30 L. J. (Q. B.) 32; *Scotson*
Bing. 5; *Bunn v. Guy*, 4 East, *v. Pegg*, 30 L. J. (Ex.) 225.
 190; *Surtees v. Lister*, 30 L. (m) Ante, p. 151.
J. (Ex.) 369; *Cooke v. Wright*,

promise was therefore not *nudum pactum*, and was binding on the captain (n). In this case it will be observed that the proceeding in the ship which had been rendered unfit for the voyage by the loss of a portion of the crew was not obligatory on the remainder, but was a detriment to them which they had not engaged to undergo ; as well as a benefit to the captain which he was not entitled to demand. In a more recent case the defendant being in the employment of the plaintiffs in one capacity, agreed with them to serve them in another, it being understood at the time that the terms of their agreement should be reduced into writing. He thereupon entered into the latter employment, and being in it the written agreement was signed by him stating that in consideration of his entering into the plaintiff's employment at such a salary, he thereby agreed to do so, with the understanding that if he performed similar services for any other on the same ground he should pay the plaintiffs the sum of £50. It was argued that having already entered on his new employment before he signed the agreement, he was in their employ on an implied contract, to serve them on his part, and to be paid on theirs, and consequently that the superadded restriction not to serve other persons was without consideration. But it is clear, and was so considered by the Court of Common Pleas, that the agreement was

(n) 26 L. J. (Q. B.) 322 ; 7 E. & B. 872.

not perfected till it was signed, and that if he had refused to sign it the plaintiffs might have refused to employ him any longer, and consequently that the consideration was really, as stated in the written agreement, his entering into the plaintiffs' employment at such a salary (o).

In strict agreement with what has been said, this consideration must proceed from the party to whom the promise is made. If it proceed from some third person, not in any way moved or affected thereto by the promisee, the latter is a stranger to the consideration, and a promise made to him is *nudum pactum*. Thus, in the case of *Thomas v. Thomas* (p), where an action was brought upon an agreement between the executor of A. B. and the widow of the testator, which set out that the testator had declared his wish that his widow should enjoy certain premises for her life, and that it was agreed, in consideration of such desire and of the premises, that the executor should convey them to the widow, provided she would pay £1. towards the ground rent of those and certain other premises, and keep the premises conveyed in good repair; and it was contended, that the real consideration of the executor's promise was the desire to comply with the wish of the testator. The Court considered this no part of the consideration. "Consideration," said Mr. Justice Patten, "means

Must move
from promisee.

(o) *Mumford and Other v. (p) 2 Q. B. 851. See Price*
Gitling, 29 L. J. (C. P.) 105. v. Easton, 4 B. & Ad. 433.

something which is of some value in the eyes of the law moving from the plaintiff. It may be of some benefit to the plaintiff, or some detriment to the defendant, but, at all events, it must be moving from the plaintiff. Now, that which is suggested as the consideration here, a pious respect for the wishes of the testator, does not in any way move from the plaintiff; it moves from the testator, and, therefore, legally speaking, it forms no part of the consideration." And it has been decided that when very recently after a marriage between the plaintiff and the daughter of A., the fathers of both parties agreed, in order to supply a marriage portion, to pay each of them a sum of money to the plaintiff, and that the plaintiff should have full power to sue for both sums, but the agreement was made by and between the two fathers only. After the deaths of both, the plaintiff sued the executor of A. for the sum which he had agreed to pay, but he was not allowed to succeed, as he was no party to the agreement, and no consideration moved from him (q).

Adequacy
of the con-
sideration.

Provided there be some *benefit* to the contractor, or some *loss, trouble, inconvenience, or charge*, imposed upon the contractee, so as to constitute a *consideration*, the Courts are not willing to enter into the question whether that consideration be *adequate* in value to the thing which is promised

(q) *Tweedle v. Atkinson*, 30 L. J. (Q. B.) 265.

in exchange for it. Very gross inadequacy, indeed, would be an index of fraud, and might afford evidence of the existence of fraud ; and fraud, as I have already stated to you, is a ground on which the performance of any contract may be resisted. But, if there be no suggestion that the party promising has been defrauded or deceived, the Court will not hold the promise invalid upon the ground of mere *inadequacy* ; for it is obvious, that, to do so would be to exercise a sort of tyranny over the transactions of parties who have a right to fix their own value upon their own labour and exertions, and would be prevented from doing so were they subject to a legal scrutiny, on each occasion, on the question whether the bargain had been such as a prudent man would have entered into. Suppose, for instance, I think fit to give £1000. for a picture not worth £50. ; it is foolish on my part ; but, if the owner do not take me in, no *injury* is done. I *may* have my reasons. Possibly, I may think that I am a better judge of paintings than my neighbours, and that I have detected in it the touch of Raphael or Correggio. It would be hard to prevent me from buying it, and hard to prevent my neighbour from making the best of his property, provided he do not take me in by telling me a false story about it. Accordingly, in the absence of fraud, mere inadequacy of consideration is no ground for avoiding a contract. You will see two remarkable instances of this in the recent cases

of *Bainbridge v. Firmstone* (r) and *Wilkinson v. Oliveira* (s), in the former of which the defendant, in consideration that the plaintiff had consented to allow the defendant to weigh certain boilers of the plaintiff, promised to deliver up the boilers in the same condition as when he received that consent; and the Court held that the consideration was sufficient to sustain the promise. We need not inquire, said Lord *Denman*, C. J., what benefit he expected to derive. The plaintiff might have given or refused leave (t). In the latter of these cases the defendant promised to give the plaintiff £1000. for the use of a letter which contained matters explanatory of a controversy in which he was engaged, and the consideration was held not to be inadequate to support the promise.

There is an old case upon this subject, involving so singular a state of facts that I cannot forbear mentioning it. It is called *Thornborow v. Whiteacre*, and is reported 2 *Ld. Raym.* 1164.

It was an action in which the plaintiff declared that the defendant, in consideration of 2s. 6d. paid down, and £4. 17s. 6d. to be paid on the performance of the agreement, promised to give the plaintiff two grains of rye corn on Monday, the 29th of March, four on the next Monday, eight on the next, sixteen on the next, thirty-two on the next, sixty-four on the next, one hundred and twenty-

(r) 8 A. & E. 743.

(s) 1 Bing. N. C. 490.

(t) See *Smith v. Smith*, 32

L. J. (C. P.) 149.

eight on the next, and so on for a year, doubling, on every successive Monday, the quantity delivered on the last Monday.

The defendant demurred to the declaration ; and upon calculation, it was found that, supposing the contract to have been performed, the whole quantity of rye to be delivered would be 524,288,000 quarters ; so that, as Salkeld the reporter, who argued the demurrer, remarked, all the rye grown in the world would not come to so much. But the Court said, that though the contract was a foolish one, it would hold at law, and that the defendant ought to pay something for his folly. The case was ultimately compromised. I presume, however, that if, instead of demurring, the defendant had pleaded that he had been induced to enter into the contract by fraud, he would have been able to sustain his plea ; since it seems obvious, on the face of the thing, that the plaintiff was a good arithmetician, who, by a sort of catch, took in a man unable to reckon so well. Probably, the plaintiff had taken his hint from the old story regarding the invention of the game of chess. But, by demurring, the defendant admitted that there was no fraud, and, consequently, the only question was on the validity of the contract in the absence of fraud ; so that the case presents a strong example of the reluctance of the Courts to enter into a question as to the adequacy of consideration.

This reluctance is also very strongly exemplified

by some late cases turning on contracts in restraint of trade. By the law of England, a contract in general restraint of trade is void ; but if in partial restraint of trade only, it may be supported, provided the restraint be reasonable, and the contract founded on a consideration. And it was once laid down that the consideration must be *adequate*, and that the Court would enter into the question of adequacy. However, they have lately decided that they ought not to do so. These cases are particularly strong, for they are cases in which, contrary to the general rule of law, a consideration is required, even though the contract be by deed. I shall have occasion to mention them again in a subsequent lecture. At present, I will merely refer to the recent decisions (*u*).

The consideration must, nevertheless, be of *some* value in contemplation of the law ; for instance, if a man make an estate at will in favour of another, this is an insufficient consideration, for he may immediately determine his will (*x*) ; neither is the termination of disputes about debts an adequate consideration, for there may be no debt actually due, although if there be a debt, and the amount of it only in dispute, or even if it be a doubtful

(*u*) *Hitchcock v. Coker*, 6 A. S. C., in error ; *Archer v.*
& E. 438 ; confirmed by *Proctor v. Sargent*, 2 M. & Gr. 20 ; *Marsh*, 6 A. & E. 959 ; and
and *Green v. Price*, 13 M. & *Leighton v. Wales*, 3 M. & W.
W. 695 ; 16 M. & W. 346, 545.
(*x*) 1 Roll. Abr. 23, pl. 29.

question whether there be a debt or not, it will be otherwise (*y*). And, in a very recent case, where a son had given to his father a promissory note, and, to an action brought by the father against him upon it, he pleaded that he had just ground to complain of the distribution which the father had made of his property, as the father had admitted; and that it was thereupon agreed between them that the son should cease for ever to make any such complaint; and that the father would discharge him from liability on the note, and the cause of action in respect thereof; and that such agreement should be accepted in satisfaction of the note: the Court of Exchequer clearly held, that there was no consideration for the agreement of the father (*z*).

. I think that I have now sufficiently explained what it is that the law recognises as a consideration sufficient to support a promise without deed. I must not, however, conclude without noticing one class of cases which form a species of exception to the rule that a simple contract requires a consideration to support it. I allude to the case of a negotiable security, as a bill of exchange, or promissory note. These, not being under seal, are simple contracts; but there is this marked distinction between

Bills of exchange are exceptions to the rule.

(*y*) *Edwards v. Baugh*, 11 M. & W. 641. See also *Clut-
terbuck v. Coffin*, 3 M. & Gr. 842; and *England v. Davidson*, 11 Ad. & E. 856; *Wade v. Simeon*, 2 C. B. 548; *Liversidge v. Broadbelt*, 28 L. J. (Ex.) 332.
(*z*) *White v. Bluett*, 23 L. J. (Ex.) 36.

the situation in which they and that in which any other simple contract stands, namely, that they are always *presumed* to have been given for a good and sufficient consideration, until the contrary is shown. And even if the contrary *be* shown, still, if the holder for the time being have given value for the instrument, his right to sue on it cannot be taken away by showing that the person to whom it was originally given could not have sued, unless something further be shown affecting his personal right, as that he had knowledge of the circumstances, or that he took the security when overdue, which places him in the same situation as the party from whom he took it. But so long as nothing of that sort appears, every note and acceptance is *prima facie* taken to have been given for good consideration, and every indorsement to have been made on good consideration. Promissory notes and Bills of Exchange, said *Bayley, B.*, in giving judgment in *Ridout v. Bristow* (a), *prima facie* import a consideration, and it is not necessary to give evidence of it *aliunde*. But it is insisted, that as the note in question imports upon the face of it a peculiar description of consideration, that circumstance varies the general rule, and throws the burthen of proving consideration upon the plaintiff, and it is argued that the note is void upon the face of it, for want of expressing assets or forbearance. It is perfectly

(a) 1 C. & J. 231.

clear, that if, instead of taking a note, you take from a third person a written security, which cannot be supported without proof of consideration, that security must, upon the face of it, import a consideration (*b*), and there must be evidence to prove such a consideration. But you may bind yourself by an instrument which in its form imports consideration without expressing it or proving it *aliunde*. The cases upon the Statute of Frauds do not apply to the present, nor do the cases in which it has been held that a promise to pay the debt of a third person without consideration is *nudum pactum*. It is just that a promise to pay that which I am under no legal or moral obligation to pay, should be considered as *nudum pactum*, but this does not apply to an instrument importing a consideration, and which may induce forbearance to one party. I am therefore of opinion that in this case a consideration must be taken to exist, and that the maker of such an instrument is at least *primâ facie* liable to pay it. See the cases collected, Byles on Bills, last ed.; Bayley on Bills, by Dowdeswell; and Smith's Mercantile Law, last ed., by Dowdeswell.

(*b*) See now 19 & 20 Vict. c. 97, s. 3; ante, 103.

LECTURE V.

CONSIDERATION OF SIMPLE CONTRACTS.—EXECUTED CONSIDERATIONS. —WHERE EXPRESS REQUESTS AND PROMISES ARE OF AVAIL.—MORAL CONSIDERATIONS.—ILLEGAL CONTRACTS.—RESTRAINTS OF TRADE.

I ENDEAVOURED to explain in the last lecture what it is that the law of England recognises as a consideration sufficient to support a promise without deed. I stated that any benefit to the person who makes the promise, or any loss, trouble, or disadvantage undergone by or charge imposed upon the person to whom it is made, will satisfy the rule of law in this respect. In order to render this as clear as possible, I am about, before proceeding to the next branch of the subject, to illustrate it by mentioning a few decided cases, in which certain considerations have been held sufficient to support the promises founded on them.

Forbearance a consideration.

It has been frequently decided, that, if one man have a legal or equitable right of suit against another, his forbearance to enforce that legal or equitable right of suit is a sufficient consideration for a promise either by the person liable to him or

by any third person, either to satisfy the claim on which that right of suit is founded, or to do some other and collateral act. Thus, where (a) the plaintiff in an action of assumpsit stated in his declaration that he was the assignee of a bond for £728. 2s. 6d., in which the defendant was the obligor, and that, in consideration that the plaintiff would receive payment on certain specified days, and forbear proceeding in the meanwhile, the defendant had promised to pay on those days ; after a verdict for the plaintiff, it was objected, in arrest of judgment, that there was no consideration for the promise ; for that, if an action had been brought in the name of the obligee of the bond, the agreement of the assignee to forbear would have been no defence, upon a ground which I have already sufficiently explained, namely, that an obligation by deed cannot be discharged by an agreement without deed. The Court, however, decided that the consideration was sufficient ; “for,” said the Lord Chief Justice, “although the agreement to forbear would not be pleadable to an action in the name of the obligee, yet, unless the plaintiff *did* forbear according to his agreement, he would not be able to sue on the defendant’s promise.” Thus again, where (b) the plaintiff, who had been appointed by the Court of Chancery a receiver of the debts and

(a) *Morton v. Burn*, 7 A. & Bing. 5 ; *Parker v. Leigh*, 2 E. 19. Stark. 229 ; *Atkinson v. Bayn-*

(b) *Willatts v. Kennedy*, 8 *tun*, 1 Bing. N. C. 444.

monies of a firm, agreed to give time of payment to a person who owed money to the firm, in consideration of which a third person promised to guarantee the debt; in an action against the third person, it was objected that there was no sufficient consideration for his promise; the Court of Common Pleas, however, decided that there was. In another case the plaintiff had obtained judgment against Elizabeth Mackenzie for £57. debt, and 65s. costs; and, in consideration that the plaintiff would forbear to execute a *feri facias* on her goods, the defendant undertook to pay him £107. in three days. It was objected, that there was no consideration, or, at least, no sufficient consideration: but Lord *Tenterden* said, "It is true the plaintiff might not perhaps have been entitled to recover to the full extent of £107., though, it is to be observed, he might have levied the costs of the execution in addition to the sum given by the verdict. But he had a right at least to levy £60.; and if, in consideration of his forbearing that, the defendant promised to pay him the larger sum;—if the inconvenience of an execution against these goods at the time in question was so great, that the defendant thought proper to buy it off at such an expense, I do not see that the consideration is insufficient for the promise" (c).

And where a man who has a judgment debt

(c) *Smith v. Algor*, 1 B. & Ad. 603.

takes from his debtor a promissory note for the amount, payable at a certain future time, it must be inferred that he thereby enters into an agreement to suspend his remedy for that time, and if so, that is a good consideration for the giving of the note (*d*).

The proposition thus illustrated will appear still clearer if we consider that the forbearance to prosecute an action is not a valid consideration for a promise to pay a sum of money to the plaintiff, unless there be a good cause of action. Thus (*e*), where issue had been joined in a previous action for the recovery of a sum of money from the defendant, who had thereupon promised to pay the money and costs, in consideration that the plaintiff would forbear further proceedings; an action having been brought upon this promise, the defendant pleaded that the plaintiff never had any cause of action against the defendant in respect of the subject-matter of the said action. "To that," said *Tindal*, C.J., in giving judgment, "the plaintiff has demurred, and, doing so, admits the statement contained in it, that he had no cause of action in the original suit, to be true. Having made that admission, it appears to me that he is estopped from saying that there was any valid consideration for

Secus, if no cause of action.

(*d*) *Belshaw v. Bush*, 29 C. B. 651; *Wilson v. Bevan*, L. J. (C. P.) 24; *Baker v.* 7 C. B. 673.
Walker, 14 M. & W. 465. (e) *Wade v. Simeon*, 2 C. B.
 See *Tempson v. Knowles*, 7 548.

the defendant's promise. It is almost *contra bonos mores*, and certainly against all legal principle, that, when a man knows that he has no cause for it, he should still persist in prosecuting an action. Then, in order to establish a binding promise, the plaintiff must show a consideration for it, consisting of something which is either beneficial to the defendant, or detrimental to the plaintiff. It cannot, however, be said that the foregoing of such an action can be regarded by a Court as beneficial to the defendant, because he thereby saves the risk of defeat, and the extra costs which he would necessarily incur in his defence; for we must assume that the result of the action would have been in his favour, and the law would enable him to recover costs, which it regards as a compensation for all the costs the defendant sustains. Neither can the foregoing of the action be regarded as detrimental to the plaintiff, for we can only view it as saving him from the payment of those costs. The consideration, therefore, fails upon both grounds."

Doubtful
claim.

Although a man has not a clear legal or equitable right, yet if his right or claim is doubtful, and not clearly nugatory or illegal, the abandonment, or, for the same reason, the forbearance of an action brought to enforce it, is a sufficient consideration for a promise (*f*). Where the plaintiff's goods had been seized by the Excise, and he had afterwards

(*f*) *Longridge v. Dorville*, *Bank of England*, 6 Bing. 5 B. & A. 117; *Stracy v.* 754.

entered into an agreement with the Commissioners of Excise, that all proceedings should be terminated, the goods delivered up to him, and a sum of money paid by him to the Commissioners, *Parke*, B., rests his judgment on the ground that this agreement of compromise honestly made, was for a consideration, and binding (*g*). The Court of Exchequer has held that the withdrawal of an untrue defence of infancy "in a suit was a sufficient consideration for a promise to accept a smaller sum in satisfaction of a larger" (*h*). And where trustees under a local statute called on the *agent* of the owner of certain houses to pay certain expenses chargeable under the statute on the owner ; and the agent made known to them who the owner was, and that such owner and not *he* was liable ; but the trustees notwithstanding, really believing that he was liable, threatened to take proceedings against him. Thereupon the agent, although he knew he was not liable, gave his own promissory notes to the trustees, on their agreeing to take less than the amount demanded, and allowing it to be paid by instalments, and this was decided to be a good consideration (*i*). And *à fortiori*, where the right is not doubtful, but the amount of the claim only is disputed, an agreement for the settlement of all

(*g*) *Atlee v. Backhouse*, 3 Rep. 822.

M. & W. 633.

(*i*) *Cook v. Wright*, 30 L. J.

(*h*) *Cooper v. Parker*, 24 (Q. B.) 321.

L. J. (C. P.) 68 ; 15 Com. B.

disputes upon the payment of a definite but smaller sum than that claimed, is held to be founded upon sufficient consideration (*k*).

Trust a consideration.

Again it has been decided, that, if I *entrust* a man to do some act for me, although I am to pay him nothing for performing it, still the mere *trust* which I repose in him is a consideration for a promise on his part to conduct himself faithfully in the performance of it (*l*). Nay, so far do the cases on this subject go, that it is settled that not only is the reposal of such trust a sufficient consideration for an express promise on the part of the person in whom it is reposed to conduct himself faithfully in the performance of it ; but the law, even in the absence of an express promise, implies one that he will not be guilty of gross negligence. This was the point decided in the famous case of *Coggs v. Bernard* (*m*).

In this case Bernard had undertaken safely and securely to take up several hogsheads of brandy from one cellar, and safely and securely to lay them down again in another ; and he was held bound by that undertaking, and responsible for damage sus-

(*k*) *Edwards v. Baugh*, 11 M. & W. 641 ; *Wilkinson v. Byers*, 1 A. & E. 106 ; *Llewellyn v. Llewellyn*, 3 D. & L. 318.

(*l*) See *Whitehead v. Greetham*, 2 Bing. 464 ; *Shillibeer v. Glynn*, 2 M. & W. 143 ;

Bainbridge v. Firmstone, ante, p. 162.

(*m*) 2 Ld. Raym. 909. See *Gladwell v. Steggall*, 5 Bing. N. C. 733 ; *Blackmore v. Bristol and Exeter Railway*, 27 L. J. (Q. B.) 167 ; 8 E. & B. 1035.

tained by them in the removal. The reason is, said Mr. Justice *Gould*, the particular trust reposed in the defendant, to which he has concurred by his assumption, and in executing which he has miscarried by his neglect. If goods are deposited with a friend, and are stolen from him, no action will lie. But there will be a difference in that case upon the evidence how the matter appears. If they are stolen by reason of a gross neglect in the bailee, the trust will not save him from an action ; otherwise, if there be no gross neglect. But, if a man takes upon him expressly to do such an act safely and securely, if the thing comes to any damage by his miscarriage, an action will lie against him.

And on this point of the law it is that the celebrated distinction occurs between remunerated and unremunerated agents ; from the former of whom the law implies a promise, that they will act with reasonable diligence ; from the latter, only that they will not be guilty of gross negligence. Thus, where a stage-coachman received a parcel to carry gratis, and it was lost upon the road, Lord *Tenterden* directed the jury to consider whether there was great negligence on the coachman's part (n). And where the declaration stated that, in consideration that the plaintiff, at the defendant's request, would employ him to lay out £1400. on the purchase of an annuity, the defendant promised to perform his

Remunerated
and unremu-
nerated
agents.

(n) *Beauchamp v. Powley*, 1 M. & Rob. 38.

duty in the premises, yet did not do so, but laid it out in the purchase of an annuity on the personal security of insolvent persons, the Court arrested the judgment, on the ground that the defendant was a particular agent, and was not charged with having acted negligently or dishonestly (*o*). There is another equally remarkable distinction, namely, that a remunerated agent may be compelled to enter upon the performance of his trust, or at least made liable in damages if he neglect to do so ; whereas an unremunerated agent cannot, although, as we have seen, he *may* be liable for misconduct in the performance of it. The latter part of this proposition is fully explained in the great case of *Coggs v. Bernard*, above quoted. The difference is, said Mr. Justice *Powell*, between being obliged to do the thing, and answering for things which he had taken into his custody upon such an undertaking. An action will not lie for not doing the thing *for want of a sufficient consideration*, but yet, if the bailee will take the goods into his custody, he shall be answerable for them, for the taking the goods into his custody is his own act. It is also remarkably illustrated in the well-known case of *Elsee v. Gatward* (*p*), where one count of the declaration, stating that the plaintiff retained the defendant, a carpenter, to repair a house before a given day, that the defendant accepted the retainer, but did not perform the

(*o*) *Dartnall v. Howard*, 4 *Jenkins*, 2 A. & E. 256.
 B. & C. 345 ; *Doorman v.* (*p*) 5 T. R. 143.

work within the time, whereby the walls of the plaintiff's house were damaged, was held to be insufficient, as not showing any consideration ; but another count, stating that the plaintiff, being possessed of some old materials, retained the defendant to perform the carpenter's work on certain buildings of the plaintiff, and to use those old materials, but that the defendant, instead of using them, made use of new ones, thereby increasing the expense, was held good, as it appeared that the defendant had entered on the performance of the work.

Again, if one man is compelled to do that which another man ought to have done and was compellable to do, that is a sufficient consideration to support a promise by the former to indemnify him. Such is the common case of a surety who has been compelled to pay a demand made against the principal, and who, as we know, is entitled to bring an action of assumpsit to recover an indemnity. And such is also the case of an indorser of a bill, who, on account of the acceptor's default in not paying the bill when due, is compelled by the holder to pay him the amount ; the indorser may sue the acceptor to recover an indemnity (q). In like manner, if one of several joint contractors, not being partners (whose rights *inter se* are not at common law ever decided), has been compelled to pay, or in pursuance of his legal obligation has paid, the whole of their

Where one man is compelled to do what another ought to have done.

(q) *Pownall v. Ferrand*, 6 B. & C. 439.

common liability, he is entitled to recover from each of them his proportional share (*r*). An instructive example of the same rule is afforded by the case of *Sutton v. Tatham* (*s*), in which, a stockbroker having entered into a contract for the sale of stock, which was not fulfilled by his principal, and similar stock having been thereupon purchased at a higher price by the broker of the purchaser, the seller's broker, in obedience to a rule of the Stock Exchange, paid the difference, and also the commission of the purchaser's broker, it was held that he might recover from his principal the amount of such payments, by showing that it was compulsory upon him to make them. These examples seem sufficient to explain the nature of the species of consideration now before us (*t*).

I might cite a multitude of other cases in which questions have arisen as to the sufficiency of the consideration; but I think that the instances I have already given are sufficient for the purpose I had in view, which was, to illustrate the general

(*r*) *Holmes v. Williamson*, 6 C. B. 886; *Westrop v. Solomon*, 8 C. B. 345; *Taylor v. M. & S.* 158; *Prior v. Hem-* *Stray*, 26 L. J. (C. P.) 185; *brow*, 8 M. & W. 873; *Pitt v.* *2 C. B. (N. S.) 175; 26 L. J.* *Purssord*, 8 M. & W. 538; (C. P.) 287. *S. C. in Ex. Ch.* *Batard v. Hawes*, 22 L. J. (Q. B.) 443; 2 E. & B. 287.

(*s*) 10 A. & E. 27; *Paule* *(t) Toussaint v. Martin-* *nant*, 2 T. R. 100; *Fisher v.* *v. Gunn*, 4 Bing. N. C. 445; *Fallowes*, 5 Esp. 171; *Jef-* *Bayliffe v. Butterworth*, 1 Ex. *freys v. Gurr*, 2 B. & Ad. *425; Bayley v. Wilkins*, 7 833.

nature of the questions which arise on the sufficiency of a *consideration* to support a promise.

There is, however, one thing more to be observed, and that is, the distinction between *executed* and *executory* considerations. Now, with regard to the meaning of these words, which you will continually hear used in legal arguments, it is this:—an *executed consideration* is one which has *already taken place*, an *executory consideration* one which *is to take place*,—one is *past*, the other *future*. Thus, if A. delivered goods to B. yesterday, and B. makes a promise to-day in consideration of that delivery, this promise is said to be founded upon an *executed* consideration, because the delivery of the goods is past and over. But, if it be agreed that A. *shall* deliver goods to B. to-morrow, and that B. shall, in consideration, do something for A., here is an *executory consideration*, because the delivery of the goods has not yet taken place. And so, whenever, at the time of making a promise, the consideration on which it is founded is *past*, the consideration is said to be *executed*; whenever the consideration is future, it is said to be *executory*.

Now, between *executed* and *executory*, or, in other words, between *past* and *future* considerations, the law makes this distinction, namely, that an *executed* consideration must be founded on a previous request; an *executory* one need not, or, to speak more correctly, its very terms imply a request. For, if A. promise to remunerate B., in consideration that B.

Executed and
executory
considerations.

An executed
consideration
must be sup-
ported by a
previous
request.

will perform something specified, that amounts to a request to B. to perform the act for which he is to be remunerated (*u*). For instance (*x*), Bate's servant was arrested and sent to prison, and Hunt became bail for him, and procured his liberation, after which the master promised Hunt to save him harmless. Hunt was obliged to pay the servant's debt, and brought an action against Bate upon his promise to indemnify him ; but the Court held that it would not lie. "For," said the Judges, "the master did never make *request* to the plaintiff to do so much, but he did it of his own head." But, the report goes on to say, "in another action brought on a promise of twenty pounds made to the plaintiff by the defendant, in consideration that the plaintiff," *at the special instance of the defendant*, had taken to wife the cousin of the defendant, that was a "good cause of action, though the marriage was *executed* and *past* before the undertaking and promise, because the marriage ensued at the *request* of the defendant."

These two cases clearly illustrate the distinction between an *executed* consideration *moved* by a previous request, which will support a promise, and an executed consideration not moved by a previous request, which will not support a promise. You will find the same distinction clearly explained in

(*u*) 1 Smith L. C., 121, note, 272 ; *Pourtales Gorgier v. Morris*, 29 L. J. (C. P.) 208.
4th ed.

(*x*) *Hunt v. Bate*, Dyer,

Lampleigh v. Brathwaite (y), where the Court said "a mere voluntary courtesy will not have a consideration to uphold an assumpsit. But if that courtesy were moved by a suit or request of the party who gives the assumpsit, it will bind ; for the promise, though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit, which is the difference." In a very recent case this principle was applied where the question was, as to whether there had been any consideration given for a Bill of Exchange. A., having performed gratuitously services for B., received from him a promissory note, with an understanding that he should not only accept it as a gift for what was past, but that it should be a remuneration for future services to be rendered as long as B. should require them. A. continued to perform the services until B.'s death, when he sued B.'s executors upon the note. Held that as there was no contract binding A. to perform future service, there was no consideration (z).

But here arises another distinction, and it is the last to which I shall refer upon this subject ; but this is a distinction to which it is absolutely necessary to refer, in order that you may not be misled by what I have already stated. There being the rule I have just stated regarding *executed*

Where the previous request is implied.

(y) Hob. 105. See judgment in *Eastwood v. Kenyon*, 11 A. & E. 438. (z) *Hulse v. Hulse*, 25 L. J. (C. P.) 177 ; 17 C. B. 711.

considerations, namely, that an *executed consideration* must have arisen from a previous request by the person promising, in order that it may be sufficient to support the *promise*, there are certain classes of cases in which this *previous request* is *implied*, and need not be expressly proved by the person to whom the promise is given. Now the cases in which a previous request is implied are as follows.

Compulsory
payments.

First, the case which I have already stated, *in which one man is compelled to do that which another ought to have done and was compellable to do*. In this case, the consideration is an *executed* one, for the thing must have been *done* before any promise can be made to reimburse the person who has done it; but, though the consideration is *executed the law implies the request*. And therefore in this case an action may be brought for indemnity without proving any express request on the part of the defendant (a). In addition to the examples already given, the case of *Exall v. Partridge* (b) is well calculated to set this matter in a clear light. There the defendant was tenant of certain premises, and under covenant to pay rent to the landlord for them. Having neglected to pay the rent, the goods of a stranger to the contract between the landlord and tenant, which were upon the premises of the latter, were distrained by the landlord for the rent

(a) See judgment of Queen's Bench in *Batard v. Hawes*, 22 L. J. (Q. B.) 443; 2 E. & B. 287.
(b) 8 T. R. 308.

arrear, and it was held that he might sue the tenant for the money which he had paid, in order to redeem his goods ; although it is obvious, from the state of the facts, that no request that he should do so had in fact been made by the tenant. In *Grissell v. Robinson* (c), the plaintiffs had contracted to grant the defendant a lease ; the lease was prepared by their solicitor and executed. It is the general practice for the lessor's solicitor to prepare the lease, and for the lessee to pay the solicitor ; the lessee having refused so to do, the lessors paid him, as they might have been compelled to do ; and the Court decided that an action was maintainable by them for money paid at the lessee's request.

I must further observe upon this class of cases, and also upon the next, that, not only is the request implied, but the *promise* also ; for if, to put an example, A. is indebted to B. in a certain sum of money, and C. is his surety ; if C. be compelled to pay, not only is a request by A. to do so implied by law, but a promise by him to indemnify C. is also implied. And, in an action brought by C. to enforce the indemnity, he need prove no express promise, no express request, but simply that A. was indebted to B., and that he, C., as A.'s surety, was

The promise
is also
implied.

(c) 3 Bing. N. C. 10 ; *Webb v. Rhodes*, 3 Bing. N. C. 732 ; *Moon v. Guardians of Witney Union*, 3 Bing. N. C. 814 ; *Wilkinson v. Grant*, 25 L. J. (C. P.) 233 ; 18 C. B. 319 ; *Smith v. Clegg*, 27 L. J. (Ex.) 300.

compelled to pay that debt (*d*). For an example of this, you may take the common case of an accommodation acceptor or indorser, who, as soon as he has been obliged to pay the money, may maintain an action against the person for whose accommodation he accepted or indorsed (*e*).

Request implied from subsequent adoption of the consideration.

Secondly, where the person who is sought to be charged *adopts* and *takes advantage* of the benefit of the consideration. Suppose, for instance, A. purchases goods for B. without his sanction, B. may, if he think fit, repudiate the whole transaction ; but if, instead of doing so, he receive the goods and take possession of them, the law will imply a request from him to A. to purchase them, and will also imply a promise by him to re-pay A., and he will be liable in an action of *assumpsit* for money paid to his use, founded on that implied promise (*f*). The cases where goods have been supplied to children without the knowledge or express request of the father, are illustrations of this rule. Even where the goods supplied are necessities, some recognition amounting to adoption is requisite, in order to render the father liable, and to support the implied request and promise ; in such case it has often been considered sufficient that the father should have

Goods supplied to children.

(*d*) *Paule v. Gunn*, 4 Bing. L. J. (Q. B.) 157 ; 17 Q. B. N. C. 445 ; *Jones v. Orchard*, 989.
24 L. J. (C. P.) 229 ; 16 C. B. (*f*) See *Coles v. Bulman*, 6 C. B. 184.
614.

(*e*) *Driver v. Burton*, 21

seen them worn by the child without objection (*g*). See 1 Wms. Saund. 264, note 1, where you may, if you please, find a great deal of valuable information upon the whole subject of which I am now treating. It is obvious that the same rule will apply where one man does work for another without his request, as when he purchases or supplies goods for him. But suppose such a case as this: I do valuable work on your property without your knowledge, have I a claim on you for payment? "How can you help it? One cleans another's shoes, what can the other do but put them on? Is that evidence of a contract to pay for the cleaning? The benefit of the service could not be rejected without refusing the property itself." Adoption, and taking advantage of the benefit of the consideration may be such recognition or acceptance of services as may be sufficient to show an implied contract to pay for them, if, at the time, the defendant had power to accept or refuse it. Without such power acceptance of the service is no evidence of a promise to pay for it (*h*).

The *third* case, in which a request is implied, is that in which a person does, without compulsion,

Voluntary
performance
of acts
compulsory on
others.

(*g*) *Law v. Wilkin*, 6 A. & E. 718. See *Mortimore v. Wright*, 6 M. & W. 482; *Linnegar v. Hodd*, 5 C. B. 437. *Boulton v. Jones*, 27 L. J. (Ex.) 117. See *British Empire Shipping Company v. James*, 27 L. J. (Q. B.) 397; confirmed in House of Lords,

(*h*) *Taylor v. Laird*, 25 L. J. (Ex.) 332, Pollock, C.B.; 30 L. J. (Q. B.) 229.

that which the person sought to be charged was compellable by law to do. Suppose, for instance, A. owes B. £50., and C. pays it: now here, if A. promise to re-pay C., it will be implied that the payment by C. was made at his request (i). But, in this class of cases, you will observe, though the request is implied where there is a promise, yet the promise must be *express*, for the law will not imply one, as in the two last cases (k): thus, if A. is B.'s surety, and is forced to pay his debt, the law implies a request to pay it, and a promise to re-pay. If he be not B.'s surety, but pays it of his own accord, the law implies neither promise nor request, for a man cannot make me his debtor for paying money for me against my will. Yet, even in this case, if B. *expressly* promise to re-pay it, a request by him to pay it is implied, for it is a maxim that *omnis rati habitio retrotrahitur et mandato æquiparatur*.

In the three cases I have just put, the law *implies* a request, on the part of the person sought to be charged, to do that which is relied on as the consideration for the promise upon which it is sought to charge him.

These implied requests, and also the implied promises just-mentioned, are presumptions of law, of the class known as *presumptiones juris et de jure*,

(i) *Wing v. Mill*, 1 B. & East, 505; *Rex v. Oldland*, 4 Ald. 104. A. & E. 929.

(k) *Atkins v. Banwell*, 2

which are absolute and conclusive (*l*). Any law or rule of law consists in nothing more than the connecting of certain consequences with particular defined predicaments of fact. When, therefore, the law presumes or infers from any defined predicament of facts, any fact to which a legal consequence is annexed, it in effect indirectly annexes to that predicament the legal consequence which belongs to the fact presumed. Consequently, the nature and effect of the presumption or implication here made is to annex a legal consequence to the fact on which the presumption is founded, declaring that wherever the considerations to which they apply exist, the same consequence shall ensue as if they were moved by the request of the promiser, and followed by his promise; and their object mainly is, by thus supplying the request or promise, or both of them, to gain the advantage of arranging these cases in the same class with many others which much resemble them, but in which the request and the promise were actually made.

There is a fourth class of cases, in which the consideration relied on has been that one man has done for another something which that other, though not *legally*, is morally bound to do. In such cases it is clear, that, if there be no *express* promise to remunerate him, remuneration cannot be enforced. But it has been a great question, and

Moral
obligation not
sufficient.

(*l*) Stark. on Evid., 4th ed. 747.

has been frequently discussed, whether, even if there be an express promise, any request can be implied in order to support the consideration. On this question, which is but a branch of one which has been often the subject of anxious consideration, namely, in what cases a moral obligation is a sufficient consideration to support a promise, it is worth while to read the cases cited in the note (m). But it may be considered as now settled, that a merely moral consideration will not support a promise (n). A mere moral consideration has been said by high authority to be *nothing* in law (o). "A subsequent express promise," said *Tindal*, C.J., "will not convert into a debt that which of itself was not a legal debt" (p). And it was laid down by the Court of Queen's Bench, in an elaborate judgment in the case of *Eastwood v. Kenyon* (q), that an express promise can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, *had it not been suspended by some positive rule of law*, but can give no original cause

(m) *Lee v. Muggeridge*, 5 378.

Taunt. 36; *Atkins v. Banwell*,
2 East, 505; and the note to
Wennall v. Adney, 3 B. & P.
247.

(n) *Monkman v. Shepherdson*, 11 A. & E. 415; *Beaumont v. Reeve*, 8 Q. B. 483.
See *Hicks v. Gregory*, 8 C. B.

(o) *Jennings v. Brown*, 9
M. & W. 501.

(p) *Kaye v. Dutton*, 7 M.
& Gr. 807.

(q) 11 A. & E. 438; *Deacon v. Gridley*, 24 L. J. (C. P.)
17; 15 C. B. 295.

of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision" (r).

I have now said what I intended to say with regard to the sufficiency of the consideration, and the result may be thus summed up :—

Any advantage to the person promising, or damage, inconvenience, liability, or charge to the person to whom the promise is made, constitutes a sufficient consideration to uphold a promise ; but, if that consideration be executed, that is, if, at the time of making the promise, that which is to be the consideration for it has already taken place, in such case there must have been a *request* by the person promising, in order to render such a consideration sufficient. If an *express request* can be shown, there can be no difficulty ; but, if not, the law will imply one in certain cases, and those cases are—

1st. Where the consideration consists in the person to whom the promise is made being compelled to do that which the person making it ought to have done, and was compellable to do.

2ndly. Where the consideration consists in something the benefit of which the person promising has accepted and enjoyed.

(r) See remarks of Lord Denman, C. J., *ante*, p. 150.

3rdly. Where the consideration consists in the person to whom the promise is made having *voluntarily* done that which the person promising ought to have done, and was *compellable* to do, in which third case the promise must be an *express* one, whereas in the two former the law implies the promise as well as the request.

The remaining part of a contract is the promise, as to which the law in general leaves to the will of the parties this part of their mutual arrangement. Indeed, this has almost been said already in other words ; for, where it is laid down that the law will not weigh the adequacy of the consideration (*s*), it is implied that it will not weigh that of the promise. The law, however, will no more enforce an illegal promise than an illegal consideration ; but in cases of executed contracts there is a rule of law which is well worthy of attention. It is, that where the law implies a certain promise from a consideration executed—that consideration will not support any other promise than the one which the law implies (*t*). It is not difficult to see that this rule results from the principle which requires that every promise should be supported by a consideration ; for, when the consideration in question is one from which the law implies a certain promise, that promise evidently exhausts the con-

Limitation
where promise
implied.

(*s*) Ante, p. 160.

(*t*) *Elderton v. Emmens*, 6

C. B. 160, in Exchequer
Chamber.

sideration, and there is nothing left to support any other promise. Such promise, consequently, however expressly made, is *nudum pactum*. Thus, it has been decided (u), that an account stated and a sum thereupon found to be due to the plaintiff from which the law implies a promise to pay in *præsenti*, will not support a promise to pay in *futuro*; and each of the Judges (x) said, that, in order to render the promiser liable to pay on a future day, there ought to be some new consideration. Similar in principle to the instance just mentioned is the case, where one, having become tenant to another of a farm, undertook to make a certain quantity of fallow, to spend £60. worth of manure yearly thereon, and to keep the buildings in repair: an undertaking which was considered unavailable in law, because no other consideration existed but the fact that the relation of landlord and tenant had been created between the parties, and the obligations sought to be enforced are not implied by law from that mere fact (y). The promise, as the Court of Exchequer said in a subsequent and closely analogous case (z), is laid

(u) *Hopkins v. Logan*, 5 M. & W. 249; *Granger v. Collins*, 6 M. & W. 458; *Roscorla v. Thomas*, 3 Q. B. 234. See *Walker v. Rostron*, 9 M. & W. 411; and 1 Smith L. C., 4th ed., 125.

Parke, Alderson, and Maule, BB.

(y) *Brown v. Crump*, 1 Marsh. 567.

(z) *Granger v. Collins*, 6 M. & W. 458; *Jackson v. Cobbin*, 8 M. & W. 790.

(x) Lord Abinger, C.B., and

more largely than the law will imply from such a relation.

Another instance of the same principle, drawn from a different class of cases, is afforded by the case of *Roscorla v. Thomas* (a), in which the declaration, having alleged that the plaintiff *had* bought a horse of the defendant at a certain price, the defendant promised that it did not exceed five years old, and was sound and free from vice; and the plaintiff having obtained a verdict, the Court arrested the judgment, because the only promise which could be implied from the consideration was to deliver the horse upon request; and, therefore, however expressly the promise alleged might have been made, the consideration would not support it.

Illegal con-
tracts.

Proceeding in the order in which I stated to you that it was my intention to proceed, the next subject at which we arrive is, the effect of *illegality* upon the contract. And, upon this subject, I have already said generally, that every contract, be it by deed or be it without deed, is void if it stipulate for the performance of an illegal act, or if it be founded upon an illegal consideration. *Ex turpi causâ non oritur actio* is the maxim of our law, as well as of the civil. A deed, for the purpose of charging the maker, requires, as we have seen, no consideration at all to support it; but an illegal consideration is worse than none, and if it be founded upon such a

(a) 3 Q. B. 234.

one, it will be void, nor will the rules relating to estoppel prevent the party from setting that defence up. A simple contract *requires*, as we have seen, a consideration to support it. If the consideration be illegal, it is *à fortiori void*; nor will the rules which I endeavoured to explain regarding the inadmissibility of parol evidence to contradict a writing prevent that defence from being set up where the illegality does not appear on the face of the instrument, any more than the doctrine of estoppel will avail to prevent inquiry into the true consideration for a deed. Parties cannot deceive the law by the form of their contracts; and, as an illegality in the consideration is fatal, so, and upon the very same grounds, is one in the promise. “*You shall not*,” says the L. C. J., in *Collins v. Blantern* (b), “*stipulate for iniquity*.”

If the consideration be legal, a promise to do several acts, some illegal and some legal, renders the contract void as to the illegal acts (c); but if any part of the consideration be illegal, the whole contract fails.

Now illegality is of two sorts: it exists at *common law*, or is created *by some statute*.

Two sorts of
illegality.

A contract illegal at common law is so on one of three grounds: either *because it violates morality*; or *because it is opposed to the policy of the law*; or *because it is tainted with fraud*.

Contracts
illegal at
common law.

(b) 2 Wils. 341. See ante, partially treated of.
p. 17, where this subject is (c) Ante, p. 19.

Immoral
contracts.

Of the first class—those, namely, which are void because they violate the principles of morality—you will find an example in the case of *Fores v. Johnes* (d), in which Mr. Justice *Lawrence* held, that a printseller could not recover the price of libellous publications which he had sold and delivered to the defendant. “For prints,” said his Lordship, “whose objects are general satire or ridicule of prevailing fashions or manners, I think the plaintiff may recover ; but I cannot permit him to do so for such whose tendency is immoral, nor for such as are libels on individuals, and for which the plaintiff might be rendered criminally answerable for a libel.”

For this reason the printer of an immoral and libellous work cannot maintain an action for the price of his labour against the publisher who employed him. “I have no hesitation,” said *Best*, C.J., “in declaring that no person who has contributed his assistance to the publication of such a work can recover in a Court of justice any compensation for the labour so bestowed. The person who lends himself to the violation of the public morals and laws of the country, shall not have the assistance of those laws to carry into execution such a purpose. It would be strange if a man could maintain an action at law for doing that for which he could be fined and imprisoned. Every one who

gives his aid to such a work, though as a servant, is responsible for the mischief of it" (e). Upon these and similar reasonings, it has been held, that the first publisher of a libellous or immoral work cannot maintain an action against any person for publishing a pirated edition (f). Nor will a Court of equity restrain the piracy on the application of the author or publisher, the general rule being, that equity will not give relief of this kind except where a Court of law gives damages (g). And where the plaintiff, a printer, having agreed to print for the defendant a work which was to contain a dedication to be thereafter sent him, printed the work and also the dedication, but on the latter being returned to him revised, discovered for the first time that it contained libellous matter, whereupon he refused to continue the printing of it, and on the defendant refusing to accept or pay for the work without the dedication : it was held, that the dedication being libellous, the plaintiff was justified in refusing to publish it, and was entitled to recover the expense of printing the body of the work (h).

The greater number of examples of the application of this rule afforded by the books is, where illicit cohabitation or seduction has been brought forward as the consideration of the contract. These,

(e) *Poplett v. Stockdale*, R. & M. 337.

(f) *Stockdale v. Onwhyn*, 5 B. & C. 173.

(g) *Walcot v. Walker*, 7 Ves. 1.

(h) *Clay v. Yates*, 25 L. J. (Ex.) 237 ; 1 H. & N. 73.

if intended to be future, are illegal considerations (i); if already past, they are, as formerly explained, no consideration at all (k). Even the supplying lodgings or clothing (l), or a carriage to a prostitute for the purpose of enabling her to carry on her practices is illegal, and the creditor cannot recover the price (m).

Contracts
contravening
the policy of
the law.

Next, with regard to the second class—those, namely, which are void as contravening the policy of the law. It might, perhaps, have seemed more simple to have ranked this and the former in one and the same class, since it is obvious, that, wherever a contract has an immoral tendency, there it is opposed to the policy of the Law. But the reason for dividing them into two classes is, that there are some contracts which involve no offence against the laws of morality, and nevertheless are opposed to policy; such, for instance, as contracts in *general restraint* of trade, and which, therefore, are arranged in a class by themselves.

Contracts
in restraint
of trade.

There seems to be nothing obviously immoral in a man's promising or covenanting not to carry on his trade within the limits of England. Neverthe-

(i) *Walker v. Perkins*, 3 Burr. 1568.

(k) *Bridges v. Fisher*, 23 L. J. (Q. B.) 276; 3 E. & B. 642; *Beaumont v. Reeves*, 8 Q. B. 483.

(l) *Girardy v. Richardson*, 1 Esp. 13; *Jennings v. Throg-*

morton, R. & M. 251; *Bowry v. Bennet*, 1 Camp. 348. See *Feret v. Hill*, 23 L. J. (C. P.) 185; 15 C. B. 207. See *Smith v. White*, 35 L. J. (Ch.) 454.

(m) *Pearce v. Brookes*, 35 L. J. (Ex.) 134.

less, such a covenant or promise is totally void. This was decided so long ago as in the reign of Henry V.; in the Year Book of the 2nd year of which reign, fol. 5, pl. 26, a bond restraining a weaver from exercising his trade was held void: and Judge *Hull* flew into such a passion at the sight of it, that he swore on the bench, and threatened to send the obligee to prison till he had paid a fine to the King; upon which Lord *Macclesfield* observes, in *Mitchell v. Reynolds* (n), “that he could not but approve of the indignation the judge expressed, though not his manner of expressing it.” Accordingly, such contracts were declared to be void in that case, and have ever since been held void.

“The law,” said Mr. Justice *Best*, in *Homer v. Ashford* (o), “will not allow or permit any one to restrain a person from doing what his own interest and the public welfare require that he should do. Any deed, therefore, by which a person binds himself not to employ his talents, his industry, or his capital, in any useful undertaking in the kingdom, is void.

But here arises a distinction, which was first illustrated by Lord *Macclesfield*, in the celebrated case of *Mitchell v. Reynolds*, before mentioned, which has ever since been upheld. It is, that though a contract in *general* restraint of trade is

Partial restraints of trade are legal.

(n) 1 P. Wms. 181; *Gun-makers' Company v. Fell*, Willes, 384.
(o) 3 Bing. 328.

void, one in *partial* restraint of trade may be upheld; provided the restraint be reasonable, and provided the contract be founded upon a consideration. "It may often happen," continued Lord *Wynford* (then Mr. Justice *Best*), at the place which I have just cited, "that individual interest and general convenience render engagements not to carry on trade or act in a profession at a particular place, proper." "Contracts for the partial restraint of trade are upheld," said the Court of Exchequer in *Mallan v. May* (*p*), "not because they are advantageous to the individual with whom the contract is made, and a sacrifice *pro tanto* of the rights of the community, but because it is for the benefit of the public at large that they should be enforced. Many of these partial restraints on trade are perfectly consistent with public convenience and the general interest, and have been supported: such is the case of the disposing of a shop in a particular place, with a contract on the part of the *vendor* not to carry on a trade in the same place. It is in effect the sale of a goodwill, and offers an encouragement to trade, by allowing a party to dispose of all the fruits of his industry (*q*). And such is the class of cases of much more frequent occurrence, and to which this present case belongs, of a tradesman, manufacturer, or professional man taking a servant

(*p*) 11 M. & W. 653.

Cro. Jac. 596; *Jelliot v.*

(*q*) *Prugnell v. Grosse*, *Al-*
leyn, 67; *Broad v. Jollyffe*,

Broad, Noy, 98.

or clerk into his service, with a contract that he will not carry on the same trade or profession within certain limits. In such a case the public derives an advantage in the unrestrained choice which such stipulation gives to the employer of able assistants, and the security it affords that the master will not withhold from the servant instruction in the secrets of his trade, and the communication of his own skill and experience, from the fear of his afterwards having a rival in the same business at the same place. But it must always be borne in mind, that contracts in restraint of trade are in themselves, if nothing more appears to show them reasonable, bad in the eye of the law" (r).

Examples of what are considered partial restraints of trade are numerous in the books ; they are usually partial in respect of time, as not to exercise it for a specified period ; or in respect of space, as not to trade within a given district ; and in the very instructive case of *Gale v. Reed* (s), the contract was for one party not to trade with a certain class of persons in the mode specified, provided the other party traded with them therein. The defendant covenanted not to exercise the business of a ropemaker during his life, except on Government contracts, and to employ the plaintiffs exclusively to make all the cordage which should be

(r) Tindal, C. J., *Horner* (Q. B.) 185.
v. Graves, 7 Bing. 744. But (s) 8 East, 80.
 see *Tallis v. Tallis*, 22 L. J.

ordered of him by his connexion. The plaintiffs were to allow him 2s. per cwt. on the cordage made by them for such of his connexion whose debts should turn out to be good, but were not to be compelled to furnish goods to any whom they were not willing to trust. The Court considered that the defendant was not prevented from supplying those of his connexion whom the plaintiffs rejected, and consequently that the restraint to follow his trade was partial only. The case of *Chesman v. Nainby*, decided in the House of Lords upon writ of error (*t*), in which the agreement was, not to carry on the trade of a linendraper within half a mile of the place where the party was to serve as assistant; that of *Bunn v. Guy* (*u*), where it was, that one attorney in London selling his business to others should not practise as an attorney within London, or 150 miles thereof; and that of *Proctor v. Sargent* (*x*), where the servant of a cowkeeper in London engaged not to carry on the same trade as his master within five miles for twenty-four months after the determination of his service,—are very important cases, and, together with the great case of *Mitchell v. Reynolds*, before mentioned, and Mr. Smith's note thereon, should be carefully studied (*y*).

(*t*) 2 Str. 739; 3 Bro. P. C. 324; *Nicholls v. Stretton*, 10 Q. B. 346.

(*u*) 4 East, 190; *Whittaker v. Hore*, 3 Beav. 383; *Dendy v. Henderson*, 24 L. J. (Ex.) (x) 2 M. & Gr. 20; *Bennell v. Inns*, 24 L. J. (Ch.) 663.

(*y*) 1 Smith, L. C., 5th ed.

Indeed, nothing, as you must be well aware, can be more common upon a dissolution of partnership, than for the retiring partner to covenant that he will not set up the same trade within a certain distance to the injury of the continuing partner. But these restraints must, in order to be upheld, be *reasonable*; that is, a greater restriction must not be wantonly imposed than can be necessary for the protection intended. But they must be reasonable.

In *Horner v. Graves* (z), 100 miles from the place where a dentist carried on business was considered an unreasonable space from which to exclude an assistant and pupil from practising the same profession after his service was determined and his instruction completed. "We do not see," said *Tindal*, C. J., in delivering the judgment of the Court of Common Pleas, "how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either; it can only be oppressive, and, if oppressive, it is in the eye of the law unreasonable. Whatever is injurious to the interests of the public, is void, on the grounds of public policy. In the case often referred to (*Mitchell v. Reynolds*), Lord Chief Justice *Parker* says, a restraint to carry on a trade throughout the kingdom must be void;

(z) 7 Bing. 735.

a restraint to carry it on in a particular place is good ; which are rather instances or examples than limits of the application of the rule, which can only be at last what is a reasonable restraint with reference to the particular case. In that case the plaintiff had assigned to the defendant the lease of a house in the parish of A. for five years, and the defendant entered into a bond conditioned that he would not exercise the trade of a baker within that parish during that term ; and the restraint was held good, because not unreasonable either as to the time or distance, and not larger than might be necessary for the protection of the plaintiff in his established trade. No certain precise boundary can be laid down within which the restraint would be reasonable and beyond which excessive. In *Davis v. Mason* (a), where a surgeon had restrained himself not to practise within ten miles of the plaintiff's residence, the restraint was held reasonable. In one of the cases referred to by the plaintiff, 150 miles was considered as not an unreasonable restraint, where an attorney had bought the business of another who had retired from the profession. But it is obvious that the profession of an attorney requires a limit of a much larger range, as so much may be carried on by correspondence, or by agents. And unless the case was such that the restraint was plainly and obviously unnecessary, the Court would not feel justified

(a) 5 T. R. 118.

in interfering. It is to be remembered, however, that contracts in restraint of trade are in themselves, if nothing more appears to show them reasonable, bad in the eye of the law ; and upon the bare inspection of this deed, it must strike the mind of every man that a circle round York traced with the distance of one hundred miles incloses a much larger space than can be necessary for the plaintiff's protection." *À fortiori*, where the plaintiff, a coal merchant in London, had taken the defendant into his service as town traveller and collecting clerk, and the defendant agreed that he would not, within two years after leaving the plaintiff's service, solicit or sell to any customer of the plaintiff, and would not follow or be employed in the business of a coal merchant for nine months after he should have left the employment of the plaintiff, the contract was decided to be void, as a restraint of trade unlimited in point of space (b). "I cannot express," said *Parke*, B., in this case, "the rule on this subject better than has been done by *Tindal*, C. J., in giving the judgment of the Court of Exchequer Chamber in *Hitchcocke v. Coker* (c), where he says, we agree in the general principle adopted by the Court of Queen's Bench, that, where the restraint of a party from carrying on a trade is larger and wider than the protection of the party with whom the contract is made can possibly require, such restraint must be considered as unreasonable in law, and the

(b) *Ward v. Byrne*, 5 M. & W. 548. (c) 6 A. & E. 453.

contract that would enforce it must be therefore void. Now a restraint prohibiting a party from carrying on trade within certain limits of space would be good, and a contract entered into for the purpose of enforcing such an agreement as that would be valid ; and the limit of the space is that which, according to the trade he carries on, is necessary for the protection of the party with whom the contract is made." The cases upon this branch of the subject are reviewed by the Court of Exchequer in the great case of *Mallan v. May*, before mentioned ; and it may be convenient to the student to subjoin the brief observations made upon them by that Court in giving judgment (d) :—

"Applying this rule and referring to the analogous authorities, it appears to us, that, for such a profession as that of a dentist, the limit of London is not too large. In *Davis v. Mason* (e), Thetford and ten miles round, in *Hayward v. Young* (f), twenty miles round a place, were held reasonable limits in the case of a surgeon ; in that of an attorney, London and one hundred and fifty miles round, in *Bunn v. Guy* (g) ; and in *Proctor v. Sargent* (h), five miles from Northampton Square, in the county of Middlesex, was held reasonable in the case of a milkman. And it makes no difference,

(d) 11 M. & W. 667.

(g) 4 East, 190.

(e) 5 T. R. 118.

(h) 2 M. & Gr. 20 ; *Pem-*

(f) 2 Chit. 407 ; *Atkins v. Kinnier*, 4 Ex. 776 ; *Sainter v. Ferguson*, 7 C. B. 716.

berton v. Vaughan 10 Q. B. 87.

in our opinion, that it appears on the face of this record that London contains a million of inhabitants. We doubt, indeed, whether the comparative populousness of particular districts ought to enter into consideration at all ; if it did, it would be difficult to exclude others, such as the number of men of the same profession, the habits of the people in that neighbourhood, and other matters of a fluctuating and uncertain character, which would produce great difficulty and embarrassment in determining such a question." Yet the Court will take into consideration the circumstances at the time of the execution of the bond and the nature of the business, the good-will of which was sold (i). Is it not a question of fact for the Jury, and only a question of law when the excess is such as that no reasonable person can consider it right ?

Upon this principle, a covenant not at any time to carry on the business of a butcher within five miles of the place where the covenantor carried it on, before his sale of the business to the covenantee, has been supported as not unreasonable either in respect of time or distance (k). And in the very recent and important case of *Tallis v. Tallis* (l), the Court of Queen's Bench declared, that any covenant

(i) *Avery v. Langford*, 23 L. J. (Ch.) 837 ; *Harms v. Parsons*, 32 L. J. (Ch.) 247. (l) 1 E. & B. 391 ; S. C., 22 L. J. (Q. B.) 185. See *Mumford v. Gething*, 29 L. J. (C. P.) 105.
(k) *Elves v. Crofts*, 10 C. B. 241.

is valid unless it plainly appear that a restriction is imposed by it beyond what the interest of the covenantee requires.

Must be
founded on
consideration.

Further, contracts in restraint of trade must, in order to be good, be founded on a consideration, even although they be made by deed. "Where one agrees," said Lord *Lyndhurst* in a remarkable case, which is well worthy of attention (*m*), "with another to employ him, and the latter agrees not to work for any third person, such agreement is a partial restraint of trade, and must be supported by an adequate consideration." Thus, in the case of *Hutton v. Parker* (*n*), it was held most clearly by the Court of Queen's Bench, that in an action on a bond given by the defendant not to enter into the service of any other than the plaintiff within ten miles of the town of Sheffield, some consideration must be shown on the declaration, in order to make it good ; and the Court refused to presume one. But where an artisan agreed with manufacturers to serve for seven years, and not work for any other without leave ; that in times of depression of trade he should be paid part only of his wages, but if ill, another was to be employed in his room ; and that they should pay him wages and house rent, but be at liberty to dismiss him on a month's notice : the Court, thinking that the manufacturers were bound to employ him for seven years, subject to their

(*m*) *Young v. Timmins*, 1 C. & J. 339. (*n*) 7 Dowl. 739.

power of dismissal, held that there was a good consideration for the artisan's promise to serve them exclusively (o).

It was at one time thought that the Courts would enter into the question of the adequacy of this consideration, and would hold the contract void if the consideration were inadequate. However, it has lately been decided in the Exchequer Chamber (p), after great consideration, that the question of adequacy or inadequacy cannot be entertained, but that the parties must judge of that for themselves (q); a doctrine you may remember my citing as a strong instance of the unwillingness of the Courts to enter into the question of the *adequacy of consideration* at all.

Adequacy of consideration.

The reason of this last rule is very succinctly expressed by *Alderson, B.*, in *Pilkington v. Scott*, above referred to: "Before the decision in *Hitchcock v. Coker*," he says, "a notion prevailed, that the consideration must be adequate to the restraint; that was, in truth, the law making the bargain, instead of leaving the parties to make it, and seeing only that it is a reasonable and proper bargain." Although the examples here given, and indeed by

(o) *Pilkington v. Scott*, 15 M. & W. 657; *Green v. Price*, 16 M. & W. 346.
Ferguson, 7 C. B. 716. See 1 Smith, L. C., 5th ed., 351.
 (p) *Mallan v. May*, 11 M. & W. 653; 13 M. & W. 511; *Price v. Green*, 13 M. & W. 695; *Green v. Price*, 16 M. & W. 346.
 (q) Ante, p. 160, et seq.; *Archer v. Marsh*, 6 A. & E. 966; *Hitchcock v. Coker*, Id. 438.

far the greater number of instances of contracts in restraint of trade, have been instances of restraint in time or place, the restraint which the law forbids within the limits before mentioned, is not confined to restraints in time or place. Indeed one of the last cases on the subject was a covenant by a licensee of a patent for a term of years not to make or vend during the residue of the term, any machines for effectuating the same thing as the patent was obtained for, without having the patented invention applied to those machines (*r*).

Contracts in
restraint of
marriage.

Another example of contracts, illegal because in contravention of the policy of the Law, is afforded by those cases in which contracts in general restraint of marriage have been held void (*s*). Thus, in *Lowe v. Peers* (*t*), a defendant entered into the following covenant:—"I do hereby promise Mrs. Catherine Lowe that I will not marry any person besides herself. If I do, I agree to pay her £1,000. within three months after I shall marry anybody else." The Court of Queen's Bench held this contract void, remarking, "that it was not a promise to marry her, but not to marry any one else, and yet she was under no obligation to marry him." This case was affirmed in error (*u*).

(<i>r</i>) <i>Jones v. Lees</i> , 26 L. J. E. & B. 47.	
(Ex.) 9; 1 H. & N. 189.	(<i>s</i>) See <i>Newton v. Marsden</i> ,
See <i>Hilton v. Eckersley</i> , 24	31 L. J. (Ch.) 690.
L. J. (Q. B.) 353; 25 L. J.	(<i>t</i>) 4 Burr. 2225.
(Q. B.) 199, in Ex. Ch.; 6	(<i>u</i>) 4 Burr. 2234.

So, where a lady gave a bond conditioned not to marry, the Court of Chancery ordered it to be delivered up (*x*).

On the subject of marriage I may further mention, that a deed tending to the *future* separation of husband and wife is *void* on grounds of public policy (*y*) ; although a deed providing a fund for the lady's support on the occasion of an *immediate* separation is not so (*z*). And the Court of Chancery will exercise its jurisdiction in giving effect to arrangements of property contained in articles of separation, such separation having previously taken place (*a*), and will restrain the husband from doing any act contrary to his covenant in such articles, not to molest his wife (*b*). And even where the parties, after executing a lawful deed of separation, have been reconciled and have cohabited, the deed is not necessarily annulled thereby (*c*) ; but a Court of equity will compel performance of covenants therein, if it appear that such reconciliation was not intended to annul them (*d*). The distinction between the two cases of future and existing separa-

Contracts
tending to
separation.

(*x*) *Baker v. White*, 2 Vern. 215.

(*y*) *Hindley v. Marquis of Westmeath*, 6 B. & C. 200.

(*z*) *Jee v. Thurlow*, 2 B. & C. 547 ; *Jones v. Waite*, in Dom. Proc., 4 M. & Gr. 1104.

(*a*) *Wilson v. Wilson*, 1 H. L. Cas. 538.

(*b*) *Sanders v. Rodway*, 22 L. J. (Ch.) 230.

(*c*) *Wilson v. Mushett*, 3 B. & Ad. 743 ; *Randle v. Gould*, 27 L. J. (Q. B.) 57 ; 8 E. & B. 457.

(*d*) *Webster v. Webster*, 22 L. J. (Ch.) 837.

tion is obvious. The deed, in the former case, contemplates and facilitates that which the law considers an evil—namely, the separation of husband and wife ; in the latter case, the evil is inevitable, and the effect of the deed is but to save the wife from destitution.

Marriage
brocage con-
tract.

Almost the converse of these cases of deeds of separation are what are called *Marriage brocage contracts*, that is, where a man has agreed, in consideration of money, to bring about a marriage. These are all void as against public policy, the law considering that unions so brought about are unlikely to be happy ones. This class of cases is founded upon a case in the House of Peers (e), in which Thomas Thinne gave an obligation of £1,000. to Mrs. Potter, conditioned to pay her £500. within three months after he should be married to Lady Ogle, “a widow,” the reporter says, “of great fortune and honour, for she was the daughter and heir of Jocelyn Percy, Earl of Northumberland.” The Master of the Rolls decreed this bond to be void ; the Lord Keeper reversed the decree ; whereupon there was an appeal to the House of Peers ; and, upon hearing the cause there, all the Lords but three or four were of opinion that all such contracts are of dangerous consequences, and ought not to be allowed ; and they reversed the decree of dismissal made by the

(e) *Hall v. Potter*, 3 Lev. 411.

Lord Keeper, and decreed the obligation to be void.

Another, and an extensive class of cases is that in which the contract has a tendency to obstruct the course of public justice. These must be left for the next Lecture.

LECTURE VI.

ILLEGAL CONTRACTS.—FRAUD.—USURY.—GAMING
AND HORSE RACING.—WAGERS.

Contracts
obstructing
the course of
justice.

THERE is another remarkable instance of contracts falling under the class of which we have been treating—namely, of illegality created by the rules of common law, which it will be right to specify before proceeding to the next branch of the subject. It consists of contracts, void, because having a tendency to obstruct the administration of justice. Such was the very contract in *Collins v. Blanton* (a), before mentioned—the case which first established that the person who has executed a deed is not estopped from showing, by way of defence, that it was executed for an illegal consideration, although he would not have been allowed to defend himself on the ground that there was no consideration for it at all. In that case, five persons were indicted for perjury, and it was agreed that Collins, who was their friend, should buy off the prosecutor's evidence by giving him a note for £350., in consideration of which he undertook not to appear at

(a) 2 Wils. 341.

the Assizes. And it was further agreed that, in order to indemnify Collins against the consequences of being called upon to pay the note, Blantern should give Collins his bond conditioned for the payment of £350., the same sum for which the note was made. In an action brought upon the bond, the Court of Common Pleas held that it was void, and that a plea showing the consideration on which it was given was a good answer to the action. There is a late case of *Unwin v. Leaper* (b), which involves the same principle. There, an action of ejectment had been brought by Unwin against Leaper, when the latter gave notice of his intention to sue Unwin for certain statutable penalties incurred by him. Thereupon it was arranged that the action of ejectment should be dropped, that Unwin should pay down £50. towards Leaper's expenses in that action, and that Leaper should not proceed with the suit for the penalties; and the Court of Common Pleas held that the £50. which had been paid might be recovered back as a payment made in order to compromise a penal action. In another instance, (c), where one of two parties to an agreement to suppress a prosecution for embezzlement, sued the other for an injury indirectly arising out of that agreement, he was not allowed to maintain the action; and it appears in this case,

(b) 1 M. & Gr. 747.

7 Taunt. 246; *Att. Gen. v. Hol-*

(c) *Fivaz v. Nicholls*, 2 C.

lingworth, 27 L. J. (Ex.) 102;

B. 501. See *Simpson v. Bloss*,

2 H. & N. 416.

that where a man cannot make out a claim, except through an illegal transaction, such claim cannot be effectuated in a court of law. Of the soundness of these decisions, to use the words of the Court of Queen's Bench in speaking of that in *Collins v. Blanter*, no doubt can be entertained, whether the party accused were innocent or guilty of the crime charged. If innocent, the law was abused for the purpose of extortion (*d*); if guilty, the law was eluded by a corrupt compromise, screening the criminal for a bribe (*e*).

Indictments
for some
misdemeanours
may be
compromised.

Here, however, it is convenient to observe that there are some instances, in which indictments for misdemeanours *may* be compromised. It is well known that a party committing certain private injuries may be indicted, as for a misdemeanour, as well as sued in a civil action; a remedy necessary for the party injured, who, if he could proceed by action only, would be in fact remediless in cases where the defendant could not pay the damages recovered. In many such cases it can hardly be admitted that the prosecution is to be considered public, or that the public interest is concerned in bringing such an offender to justice by way of example to others. Substantially, the only one who suffers by the wrong is the individual against whom it is committed. In instances of this kind, the law does not forbid a compromise between the injurer and the

(*d*) *Goodall v. Lowndes*, 6 Q. B. 464.

(*e*) *Keir v. Leeman*, 6 Q. B. 316.

injured. "The law," says the Court of Queen's Bench, in *Keir v. Leeman* (*f*), "will permit a compromise of all offences, though made the subject of a criminal prosecution, for which offences the injured party might sue and recover damages in an action. It is often the only manner in which he can obtain redress. But if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it." The law will therefore sanction a bond, conditioned to remove a public nuisance, founded on the abandonment of an indictment for that nuisance, which is in fact a very common instance of compromise (*g*). The compromise of indictments for assaults is another frequent instance of the same rule (*h*). But if, as in *Keir v. Leeman*, the offence is not confined to personal injury, but is accompanied with riot and the obstruction of a public officer in the execution of his duty, these are matters of public concern, and therefore not legally the subject of a compromise.

To return to the subject of contracts tending to obstruct the course of justice. The case of *Coppock v. Bower* (*i*) is another instance of their illegality. In this case an agreement to withdraw an election petition in consideration of a sum of money, was held void (*k*).

(*f*) 6 Q. B. 321. Taunt. 422.

(*g*) *Falloves v. Taylor*, 7 T. R. 475. (*i*) 4 M. & W. 361.

(*h*) *Baker v. Townsend*, 7 361. (*k*) Ante, p. 16; 4 M. & W.

Inconsistent
with public
duties.

The case of *Arkwright v. Cantrell* (l) is an instance where the grant of a judicial office to a person interested in the matters which would become the subjects of adjudication, was held void. For a similar reason, contracts to induce voters, for any consideration of advantage to themselves, to vote in favour of a particular candidate, are illegal and void. Thus, when a candidate himself makes a contract with any one to supply meat and drink to electors, it is void ; and if the things be supplied, the person supplying cannot recover the price from the candidate (m); for, by the policy of the law, the electors should be free to use their own unbiassed judgment in selecting the candidate most fit to serve the public as a member of the great council of the nation. Persons who have the right of appointing to public offices of trust or to any favour from the Crown, are bound to use a like discrimination. All agreements, therefore, to pay money for an appointment to any public office of trust, or for the grant of any public favour, are illegal (n).

Illegal
indemnities
and releases.

Agreements to indemnify persons against the consequences of illegal acts fall within the same rule as contracts directly to obstruct the administration

(l) 7 Ad. & E. 365. See *H. Bl. 322* ; *Hopkins v. Prescott*, 4 C. B. 578 ; *Harrington v. Du Chatel*, 1 Bro. C. C. 124 ; *Græme v. Wroughton*, 24 L. J. (Ex.) 265 ; *Corp. of Liverpool v. Wright*, 28 L. J. (Ch.) 868.

(m) *Thomas v. Edwards*, 2 M. & W. 218.

(n) *Parsons v. Thompson*, 1

(Ch.) 868.

of justice (*o*). So also do all promises which are made to obtain release from duress of person by illegal arrest, or under compulsion of colourable legal process, whereby it is made the instrument of oppression or extortion ; but not where the arrest was legal (*p*) ; and for similar reasons money extorted by duress of the plaintiff's goods, and paid by him under protest, may be recovered back (*q*).

Maintenance and champerty are so often talked of as contracts having an illegal object and consideration, that they seem to require a slight allusion here. For one who has no interest in the subject of a suit, and no just right to interfere in it, to aid by money or otherwise the parties interested, is maintenance, and is forbidden by the law, whose policy has always been to discourage disputes and litigation. A contract therefore by him to aid in such an object is void ; but a man who has an interest in the cause, or reasonably thinks he has, is not guilty of maintenance if he prosecutes it in common with others, and his agreement so to do is good (*r*). If a person, having no interest in a suit, interferes with the object of sharing in the fruits of

Maintenance
and cham-
perty.

(*o*) *Shackell v. Rosier*, 2 Bing. N. C. 634.

(*p*) See *The Duke de Cadaval v. Collins*, 4 A. & E. 858 ; *Cumming v. Hooper*, 11 Q. B. 112 ; *Johnston v. Royal Mail Steam Packet Company*, 37 L. J. (C. P.) 33.

(*q*) *Ashmole v. Wainwright*, 2 Q. B. 837 ; *Wakefield v. Newton*, 6 Q. B. 276 ; *Fernley v. Branson*, 20 L. J. (Q. B.) 178.

(*r*) *Findon v. Parker*, 11 M. & W. 675.

the suit, this is champerty (s). If, therefore, an attorney agrees not to charge his client costs, in consideration of having for himself a proportion of what he may recover for him, this agreement is champerty, and consequently illegal and void (t). If no suit be depending, or any stipulation for the commencement of one, a contract to supply documents and information whereby property may be recovered, in consideration of a share of the property when recovered, is legal. But if persons, having themselves no claim on the property, agree with a claimant that legal proceedings shall be instituted in his name to recover it, and they will supply him with documents, information, and evidence not specified, but such evidence as will enable him to recover it, and to be rewarded with a share when recovered, this is maintenance in its worst aspect (u). It is worth observing, that it is mainly for the purpose of avoiding maintenance that the rule of our law forbidding the assignment of choses in action has been established (x), a rule which, as the

(s) *Williams v. Protheroe*, J. (Q. B.) 64 ; 7 E. & B. 58 ; 3 Y. & J. 129 ; *Stanley v. Jones*, 7 Bing. 369 ; *Hilton v. Woods*, 36 L. J. (Ch.) 941.

(t) *Re Masters*, 4 D. P. C. 18, per Coleridge, J. ; *ex parte Yeatman*, Id. 304 ; *Earle v. Hopwood*, 30 L. J. (C. P.) 217.

(u) *Sprye v. Porter*, 26 L.

J. (Q. B.) 64 ; 7 E. & B. 58 ; *Simpson v. Lamb*, Id. 121 ; 7 E. & B. 84 ; *Knight v. Bowyer*, 26 L. J. (Ch.) 769 ; 27 L. J. (Ch.) 520 ; *Anderson v. Radcliffe*, 28 L. J. (Q. B.) 32 ; S. C. in Ex. Ch., 29 L. J. (Q. B.) 128.

(x) Litt. 347 ; Co. Litt.

214, a ; Shep. Touch. 240.

law admits the assignee to sue in the name of the assignor, seldom interferes with the liberty required by trade and commerce ; and, by keeping up the remembrance that the assignee can have no rights to the thing assigned other than those possessed by the assignor at the time of the assignment, serves to prevent many inconveniences which might arise, were all choses in action as negotiable as bills of exchange.

The Apothecaries Act requires that a student, previously to being admitted to examination for the purpose of obtaining his certificate to practise as an apothecary, should have served an apprenticeship for five years. Where the father of a student agreed with an apothecary to take his son as an apprentice for two years, but to antedate the articles, so that it should seem that he had been apprenticed for the legal term of five years, in order that, at the expiration of two years only, he might be admitted to his examination, and gave the apothecary a bond to secure the payment of a premium stipulated to be given upon such apprenticeship, the Court of Common Pleas held that the bond was clearly void (y).

Lastly, all contracts between British subjects and alien enemies, not having a licence to trade with this country, are void, and cannot be enforced,

(y) *Prole v. Wiggins*, 3 Bing. N. C. 230.

even upon the return of peace (z). The sovereign of this country has the right to proclaim war, with all its consequences, enforcing or mitigating them either generally or in particular instances, as may be thought best by the Government. One of these consequences is, that trade and dealing with the enemy, unless expressly permitted, are forbidden. For a British subject, not domiciled in a neutral country, to ship a cargo from an enemy's port, is *prima facie* dealing and trading with the enemy, and therefore forbidden by law ; and consequently a contract made before the war, under which it is agreed that a cargo shall be shipped from a port which, by the declaration of war, becomes that of the enemy, is thereby rendered illegal, and no action can be founded upon the fact of its not being performed (a). But if the contract had been made before the war between their respective countries began, the parties thereto may sue upon it when peace is restored (b).

Contravening
objects of
Legislature.

Agreements contravening the ends and objects of the enactments of the Legislature, or, as it is most commonly expressed, the policy of those enactments, are void (c). And this class of illegality is properly

(z) *Kensington v. Inglis*, 8 E. & B. 729 ; 26 L. J. (Q. B.) East, 273. See *Potts v. Bell*, 5 ; 6 E. & B. 953, in Ex. Ch. 8 T. R. 548.

(a) *Espósito v. Bowden*, 27 L. J. (Q. B.) 17, in Ex. Ch. ; 217.

(b) *Alcenius v. Nygrin*, 24 L. J. (Q. B.) 19 ; 4 E. & B. 7 E. & B. 763 ; *Reid v. Hoskins*, 24 L. J. (Q. B.) 315 ; 5 B. 462.

arranged with other instances of illegality by the common law, because it does not consist in the breach of any enactment of a statute, but violates the principle of the common law, which is to carry into effect the intent and object of the Legislature. The most common instances of this illegality are afforded by agreements to give a creditor of a bankrupt or insolvent more than his equal share of the bankrupt's or insolvent's estate, which it is the object of the Bankrupt and Insolvent Acts to divide equally amongst his creditors (*d*).

In the cases lately referred to, so much is said of the policy of the law and public policy, that it is desirable to add a few words in explanation of them. These terms have been used to express an important principle from very early periods (*e*), and one of the most important cases of very modern times has been decided upon grounds of public policy (*f*). They are, however, used indiscriminately in many of the cases, although perhaps the phrase "policy of the law" indicates more correctly the sense in which the terms are used in law, than the words

(*d*) *Staines v. Wainwright*, 6 Bing. N. C. 174; *Davis v. Holding*, 1 M. & W. 156; *Tabram v. Freeman*, 2 C. & M. 451; *Wilkin v. Manning*, 23 L. J. (Ex.) 174; 9 Ex. 575. See *Nerot v. Wallace*, 3 T. R. 17, a very instructive case; *Hills v. Mitson*, 22 L. J. (Ex.) 273; 8 Ex. 751; *Murray v. Reeves*, 8 B. & C. 421; *Humphries v. Smith*, 22 L. J. (Q. B.) 121.
 (*e*) Shep. Touch. 132; Co. Litt. 206, b.
 (*f*) *Egerton v. Brownlow*, 4 H. L. C. 1.

“public policy.” Whichever form is employed, two distinct classes of things are referred to by them. Sometimes they indicate the spirit of a law as distinguished from the letter of it ; as when it is said that contracts made by a trader, giving a preference to particular creditors, although not forbidden by the letter of any enactment, violate the policy of the bankrupt laws, the first object and policy of those laws being to make a rateable distribution of the bankrupt’s property amongst all his creditors (*g*). In this sense the words are also used, when, in construing a particular law, the Judges look at the object and policy with which it was framed, and the evil which it was apparently intended to remove (*h*). They use the policy of a particular law as a key to open its construction.

At other times these expressions indicate a principle of law, which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good (*i*). If this be understood as the public good, recognised and protected by the most general maxims of the law and of the constitution, it furnishes a rule much more general than the first class, yet definite in its terms, and clearly distinguishable from that class of public policy or political expediency which would comprise such questions, as, whether it is wise to

(*g*) Id. 87, per *Cresswell*,
J. ; *Coles v. Strick*, 15 Q. B. B.
2.

(*h*) Id. 107, per *Alderson*,

(*i*) Id. 196, per Lord *Truro*.

have a sinking fund or a paper circulation, and which would properly guide the Legislature or the executive government in determining any question which they might have to deal with. It is evident that Courts of Law cannot decide upon these considerations.

It would seem that all the cases which have been decided upon the ground of public policy are referable to one or other of the two classes above mentioned, and perhaps this section of law cannot be summed up in a way more satisfactory to the reader than by quoting the words of *Parker, C. J.*, in the famous case of *Mitchell v. Reynolds* (k): "All the instances of a condition against law in a proper sense are reducible under one of these heads: 1st, either to do something that is *malum in se* or *malum prohibitum*; 2ndly, to omit the doing of something that is a duty; 3rdly, to encourage such crimes and omissions. Such conditions as these, the law will always, and without regard to circumstances, defeat, being concerned to remove all temptations and inducements to those crimes." For when the letter of the law forbids to do anything which is *malum in se* or *malum prohibitum*, and prescribes the performance of all which it considers as a duty, it may well be thought that public policy or the policy of the law forbids to do anything which may encourage the wrong or deter from the duty.

(k) 1 P. Wms. 189.

Fraud.

Standing by.

The instances which I have mentioned are those in which illegality at common law is most frequently set up for the purpose of invalidating a contract. To these must be added the third class of cases which I specified: those, namely, in which the contract is avoided on the ground of fraud; that is, deceit practised upon the contracting party in order to induce him to enter into it (*l*). As to the deceit, it may be of an active kind, as falsehood and misrepresentation (*m*) actually used by one party for the purpose of deceiving the other; or it may be passive, as where a vendor knows that a purchaser labours under a delusion, which he also knows is influencing his judgment in favour of purchasing, and suffers him to complete his purchase under that delusion (*n*). The plaintiffs prepared an agreement of guaranty in which they recited a prior agreement, by which it appeared that they had already trusted the debtor on the guaranty of A. B., that the debtor had been sometime salesman to them, on the terms that he was to be answerable

(*l*) *Evans v. Edmonds*, 22 L. J. (C. P.) 211; 13 C. B. 777; *Bwlch y Plomhead Mining Company v. Baynes*, 36 L. J. (Ex.) 183; *Cowan v. Milburn*, 36 L. J. (Ex.) 124; *Central Railway Company of Venezuela v. Kisch*, 36 L. J. (Ch.) 849; *Ross v. Estates Investment Society*, 36 L. J. (Ch.) 54.

(*m*) *Taylor v. Ashton*, 11 M. & W. 400; *Barley v. Walford*, 9 Q. B. 197; *Barnes v. Pennell*, 2 H. L. C. 497; *Gerhard v. Bates*, 22 L. J. (Q. B.) 367; 2 E. & B. 476, S. C.

(*n*) *Hill v. Gray*, 1 Stark 434. See *Keates v. Lord Cadogan*, 20 L. J. (C. P.) 76; 10 C. B. 591.

for the price of the articles sold by him, and to pay for them monthly, and that in order to induce them to continue the arrangement defendant had agreed to guarantee, provided that defendant should give a continuing guaranty to plaintiffs for three years, to secure the amount of any balance that might at any time during those years be due to the plaintiff. But it did not recite that any debt was then due to them, nor did defendant know it. This agreement was executed by defendant, without making any inquiry. The Exchequer Chamber considered that there was evidence that plaintiffs had intentionally made a fraudulent misrepresentation to defendant to induce him to sign the agreement (o). If the representation be not known to be false by the utterer of it, or be not used with intent to deceive, it will not amount to fraud, although really false (p). Moral fraud in a representation is essential in order to invalidate a contract made upon the faith of that representation. But it is not necessary, in order to constitute moral fraud, that it should be false to the knowledge of the party making it: if untrue in fact, and not believed to be true by the party making it, and made for a fraudulent purpose, it is both a legal and a moral fraud (q). This

(o) *Lee v. Jones*, 34 L. J. L. J. (Ex.) 243; 8 Ex. 725, (C. P.) 131. S. C.

(p) *Evans v. Collins*, 5 Q. B. 804, 820, Ex. Ch., in error; (q) 2 Smith's L. C., 5th ed., note to *Pasley v. Freeman*.
Ormrod v. Huth, 14 M. & W. 651; *Thom v. Bigland*, 22

deceit, moreover, must also actually induce the contracting party to enter into the contract. If he contracted, not believing it, or trusting to his own judgment, and not to the representation, he cannot avoid this contract on account of the falsehood (r). This is so very well known a point, and one of such continual recurrence in practice, that it is useless to multiply examples of its application.

Contracts
illegal by
statute.

We next come to that class of contracts which are void because infected with illegality, existing not by the rules of common law, but under the express provisions of some statute.

Now, with regard to this class, I need hardly say that no contract prohibited by the *express* provisions of a statute can be enforced in any Court of law ; but it is necessary that you should also bear in mind that an *implied* prohibition is equally fatal to its validity.

"Where a contract," says Lord *Tenterden*, in *Wetherell v. Jones* (s), "is *expressly* or by *implication* forbidden, no Court will lend its assistance to give it effect." Thus, where the cargo of a ship which was to sail from a British port in North America to a port in the United Kingdom between the 1st of September and the 1st of May, had part of its cargo loaded on the deck, which is forbidden by 16 & 17 Vict., c. 107, ss. 170, 171, and 172, and

(r) *Moens v. Heyworth*, 10 *Tindal*, C.J.
M. & W. 147 ; *Shremsbury v.* (s) 3 B. & Ad. 221.
Blount, 2 M. & Gr. 475, per

the owners, knowing these things, insured the cargo and the freight, the whole voyage was held illegal, and the owners were not permitted to recover the insurance (*t*). The examples which most commonly occur in practice of implied prohibition are in cases in which an Act does not *in express terms* enact that a particular thing shall not be done, but imposes a penalty upon the person doing it. In such cases, the imposition of the penalty is invariably held to amount to an implied prohibition of the thing itself on the doing of which the penalty is to accrue. In *Bartlett v. Viner* (*u*), which is always referred to as a standard authority on this subject, *Holt, C. J.*, says, "Every contract made for or about any matter or thing which is prohibited and made unlawful by statute, is a void contract, though the statute does not mention that it shall be so, but only inflicts a penalty on the offender; because a penalty implies a prohibition, though there are no prohibitory words in the statute." A penalty implies a prohibition.

According to this principle, where a statute reciting the inconvenience which happens by watermen taking apprentices before they are housekeepers, enacted that it should not be lawful for any waterman to take or keep any apprentice unless he should be the occupier of some house or tenement, wherein to lodge the said

(*t*) *Cunard v. Hyde*, 29 L. Rowlands, 2 M. & W. 157; J. (Q. B.) 6. *Cundell v. Dawson*, 4 C. B.

(*u*) Carth. 252; *Cope v.* 396.

apprentice and himself, and that he should keep such apprentice in the same house or tenement wherein he himself should lodge, on pain of forfeiting £10. for every offence, the Court of King's Bench decided that any contract to take an apprentice, entered into by such waterman not being an occupier of some house or tenement, as required by the Act, was prohibited; and, consequently, that a pauper who had bound himself by indenture to serve such a waterman unprovided with the required accommodation, and had served under it as apprentice, gained no settlement by such binding and service (x). For the same reason, a statute having required that with all coals delivered in London above a certain quantity, the seller should deliver a certain ticket, and in case of not delivering the ticket, should for every offence forfeit a sum not exceeding £20., the seller of a quantity of coals, who had omitted to deliver a ticket with them to his customer, was held not to be entitled to sue him for the price (y). The statute 6 Anne, c. 16, requires all brokers within the City of London to be admitted by the Court of Mayor and Aldermen, and provides that if any one shall act as broker, not having been so admitted, he shall forfeit to the use of the Mayor, Aldermen, and Citizens £25. for every offence (z). It has been

(x) *King v. Inhabitants of Gravesend*, 3 B. & Ad. 240. C. B. 376.

(y) *Cundell v. Dawson*, 4 c. 16, is repealed by 57 Geo. 3,

(z) This portion of 6 Anne,

decided that a broker not so admitted cannot recover his commission for work done by him as a broker (*a*). In like manner, where a railway company, requiring an Act of Parliament, must, under 7 & 8 Vict., c. 110, s. 4, be provisionally registered, and by sect. 24 a penalty is imposed for making any contract before provisional registration, no action will lie for work done for them before they are so provisionally registered (*b*). In the case of a pawnbroker who had not made the entries required by the Pawnbrokers' Act, it was held that he had not even a lien on the goods whereon he had advanced money, although the statute merely provided that this neglect should subject him to a penalty (*c*). And in a very recent case, an agreement made between a licensed victualler, who kept an hotel, to let the cellar in his house, wherein another was to retail liquors without any license, was held void, although the statute requiring the license merely enacted that any person who should sell exciseable liquor by retail without a license, should forfeit from £5. to £20. (*d*). The cases decided upon this principle are very numerous, but these instances have been selected because, while

c. 60, s. 2, and a penalty of Ex. Ch.

100*l.* substituted.

(*a*) *Cope v. Rowlands*, 2 M. & W. 149; *Smith v. Lindo*, 27 L. J. (C. P.) 196; 4 C. B. (N. S.) 395; 27 L. J. (C. P.) 335; 5 C. B. (N. S.) 587, in

(*b*) *Abbott v. Rogers*, 24 L. J. (C. P.) 158; 16 C. B. 277.
(*c*) *Fergusson v. Norman*, 5 Bing. N. C. 76.
(*d*) *Ritchie v. Smith*, 6 C. B. 462.

they illustrate the subject, they at the same time show how very many ordinary affairs, if not transacted in the manner prescribed by law, are forbidden no otherwise than by the imposition of a penalty.

Revenue Acts.

Before leaving this subject, it will be convenient to advert to a distinction, in cases of this sort, between acts which are prohibited for the public advantage, and such as are prohibited for purposes of revenue ; for it has been sometimes thought, that, in the latter class of instances, the only consequence is to make the person committing such acts liable to the penalty, and not to make his contract unavailable (*e*). But, it may safely be laid down, notwithstanding some dicta apparently to the contrary, that, if the contract be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so had in view the protection of the revenue or any other object (*f*). The sole question is, whether the statute means to prohibit the contract.

Thus, the statute 36 Geo. III. c. 88, to prevent abuses and frauds in the packing, weight, and sale of butter, enacts, in s. 2, that every cooper or other person making a vessel for packing butter shall brand his christian and surname on such vessel, together with the exact weight or tare thereof, or

(*e*) *Forster v. Taylor*, 5 B. 254 ; 10 Ex. 293.
 & Ad. 887 ; *Taylor v. Crow-* (*f*) *Cope v. Rowlands*, 2 M.
land Gas Co., 23 L. J. (Ex.) & W. 149.

in default he is to forfeit, for every such vessel not so marked, 10s. By sec. 3, every dairyman, farmer, &c., who shall pack any butter for sale, shall pack the same in vessels so made and marked as aforesaid, and shall mark his christian and surname on different parts of the vessel therein described, and on the butter contained in such vessel, on penalty of forfeiting for every default £5. In an action brought by a farmer to recover the price of fifteen firkins of butter sold by him to the defendant, it appeared that the firkins were not marked according to the Act, and the Court held that the provisions which required the vessel to be branded with the name of the cooper, seller, &c., being intended for the protection of the public against fraud, indirectly prohibited any sale of butter in vessels not properly marked ; that the subject-matter of this contract was in such a state, from the vessels not being properly marked, that the sale of it was forbidden by Act of Parliament ; and, consequently, that the contract of sale was void and the plaintiff could not recover. They also held, that, although there was a penalty imposed in the same clause of the Act which directed the thing to be done, yet the remedy of the public against a person infringing the clause was not thereby limited to a proceeding for the penalty ; but that the clause might be used against him as a defence to an action (g).

(g) *Forster v. Taylor*, 5 B. & Ad. 887.

But upon the other hand, where the 25th and 26th sections of the Excise License Act, 6 Geo. IV. c. 81, subject to penalties any manufacturer of, or dealer in, or seller of tobacco, who shall not have his name painted on his entered premises in manner therein mentioned, or who shall manufacture, deal in, retail, or sell tobacco, without the license required for that purpose, it was considered that these enactments do *not* avoid a contract of sale of tobacco made by a manufacturer or dealer who has not complied with the requisites of these sections: their effect is merely to impose a penalty on the offending party for the benefit of the revenue. The question is, said *Alderson, B.*—Does the legislature mean to prohibit the act done, or not? If it does, whether it be for the purposes of revenue or otherwise, then the doing of the act is a breach of the law, and no action can arise out of it. But here the legislature has merely said, that where a party carries on the trade or business of a dealer in or seller of tobacco, he shall be liable to a certain penalty if the house in which he carries on the business shall not have his name, &c., painted on it, &c., in letters publicly visible and legible, and at least an inch long, and so forth. He is liable to the penalty, therefore, by carrying on the trade in a house in which these requisites are not complied with; and there is no addition to his criminality if he makes fifty contracts for the *sale* of tobacco in such a house. It seems to me, therefore, that there

is nothing in the Act of Parliament to prohibit every act of sale, but that its only effect is, to impose a penalty for the purpose of the revenue on the carrying on of the trade without complying with its requisites (*h*).

But so far are the Courts from treating lightly cases whose object is the protection of the revenue, that, in a more recent case, where the vendor of goods sold abroad knew that it was the purchaser's intention to smuggle them into this country, but rendered no aid to him in his unlawful act, although the Court held that the commission of that act, with such knowledge on the vendor's part, did not prevent his recovering the price (*i*), yet, if he had been a party concerned in breaking the revenue laws, as if, in pursuance of his contract, he had so packed the goods as to assist the purchaser in smuggling them, he could not have recovered the price (*k*).

Now the general principle upon which all cases of statutable illegality depend, being as above laid down, it is necessary that you should bear in mind a practical distinction which exists between this class of contracts—contracts, I mean, forbidden by the *express* or *implied* enactment of some statute—and another class, in which the *contract* itself does not violate the statute, but some *incidental illegality* occurs in carrying it into effect. In these

Illegality
merely
incidental to
contracts.

(*h*) *Smith v. Mawhood*, 14 M. & R. 311.
M. & W. 452.

(*k*) *Waymell v. Reed*, 5 T.

(*i*) *Pellecat v. Angell*, 2 Cr. R. 599.

latter cases the contract is good, and may be made the subject-matter of an action, notwithstanding the breach of the law which has occurred in carrying it into effect.

The best mode of explaining this is by an example. In *Wetherell v. Jones* (l), a rectifier of spirits brought an action against a confectioner to recover the price of spirits sold and delivered to him. The defence relied upon was illegality. It appears, that, under the Excise Acts, a rectifier or distiller, when he sends out spirits, is bound to send with them a permit truly specifying their strength. The plaintiff had sent a permit, but it did not specify the true strength ; and the defendant relied on this violation of the statute as an avoidance of the contract. But the Court held, that the illegality was not in the contract to sell the spirits, but in the subsequent act of removing them without a proper permit, and, therefore, that an action was maintainable upon the contract ; and Lord *Tenterden's* judgment sets the distinction in a very clear light : “ We are of opinion,” said his lordship, “ that the irregularity of the permit, though it arises from the plaintiff's own fault, and is a violation of the law by him, does not deprive him of the right of suing upon a contract which is *in itself* perfectly legal (m), there having been no agree-

(l) 3 B. & Ad. 221.

(m) It seems, that, by a subsequent statute, he would

in this case be deprived of the right of suing: 2 Will. 4, c. 16, ss. 11, 12.

ment, express or implied, in that contract, that the law should be violated by such improper delivery. Where a contract which a plaintiff seeks to enforce is expressly, or by implication, forbidden by the statute or common law, no Court will lend its assistance to give it effect ; and there are numerous cases in the books in which an action on a contract has failed, because either the consideration for the promise or the act to be done was illegal, as being against the express provisions of the law, or contrary to justice, morality, and sound policy. But where the consideration and the matter to be performed are both legal, we are not aware that a plaintiff has ever been precluded from recovering by an infringement of the law not contemplated by the contract in the performance of something to be done on his part."

With regard to the distinction of which I have been speaking, I will make but one further observation, namely, that it would apply to cases of common law as well as statutable illegality ; but I have spoken of it under the head of statutable illegality, because I do not remember any decided case arising upon a question as to illegality at common law which would aptly illustrate it. I can, however, put such a case without difficulty. Suppose,

Similar cases
of illegality at
common law

for instance, A. employs B., a builder, to repair the front of his house, and B., in so doing, erects an indictable nuisance in the public street, still, as the contract to repair the house is legal, and the erec-

tion of the nuisance in so doing was not contemplated by the agreement, B. might recover for the repairs which he had executed. But it would be otherwise if it had been made part of the agreement, that the repairs should be performed by means of the erection of the nuisance ; for, there the illegality would have entered into and formed part of the contract (*n*).

Now, the effect of illegality created by statute, being to avoid an agreement tainted with it, and such being the distinction between illegality stipulated for—contemplated by the contract—and illegality occurring incidentally during the course of its performance, I will proceed, as I did when speaking of illegality at common law, to specify some of the instances of most ordinary practical occurrence, in which the legislature has, by express provision, rendered particular contracts illegal.

Contracts void
by usury.

And *first*, although a contract cannot hereafter become void upon the ground of *usury*, yet the change from a very different state of law is so important and so recent, and so many things will for a number of years often come before you, which have been and are still affected by the usury laws, that it is necessary to give you a short history of the modern enactments on that subject.

From the reign of Queen Anne down to that of

(*n*) As to contracts of which performance has become illegal after the making, see *Brown v. Mayor of London*, 30 L. J. (C. P.) 225 ; 31 L. J. (C. P.) 280 in Ex. Ch.

William the Fourth the important statute on this subject was 12 Anne, st. 2, c. 16, which enacted that no person should take, either directly or indirectly, interest at more than 5 per cent., and that all contracts to the contrary should be void. In construing this statute, it was always held that no contract, however framed, however unlike a contract for a loan or for interest it might apparently be, would hold good if the ultimate effect of it would be to secure more than 5 per cent. interest for the loan of money. Every conceivable means was used to evade the statute. Sometimes a transfer of stock, sometimes commission on a discount, sometimes a substitution of one contract for another, or several concurrent contracts were resorted to ; but the effort of the Court was in every case to strip off the external covering of form, and get at the intent and real import of the transaction, and, if this were tainted with usury, the contract was held void (o).

Now, such being the law as constituted by the statute of Anne, the first relaxation was by statute 3 & 4 Will. IV. c. 98. That was the Act renewing the charter of the Bank of England ; and it enacted among other things in sect. 7, that bills of exchange

(o) See *White v. Wright*, 3 B. & C. 273 ; *Chippindale v. Thurston*, M. & M. 411 ; *Meagoe v. Simmons*, M. & M. 121 ; *Carstairs v. Stein*, 4 M. & Sel. 192 ; *Belcher v. Vardon*, 14 L. J. (Ch.) 427 ; see *Att. Gen. v. Hollingworth*, 27 L. J. (Ex.) 102 ; 2 H. & N. 416 ; *Langton v. Haynes*, 25 L. J. (Ex.) 319 ; 1 H. & N. 366 ; *Pollok v. Bradbury*, 8 M. P. C. 227.

1 Vict. c. 80,
and 2 & 3
Vict. c. 37.

and promissory notes, payable at or within three months after date, or not having more than three months to run, should be exempted from the usury laws. And this enactment being found beneficial, by a subsequent Act of 1 Vict. c. 80, the three months were extended to twelve months. And by a still later Act of 2 & 3 Vict. c. 37, it was enacted, "That no bill or note not having more than twelve months to run, nor any contract for the loan or forbearance of more than £10. sterling, shall be void by reason of the usury laws; provided that the Act shall not extend to the loan or forbearance of money on the security of any lands, tenements, or hereditaments, or any estate or interest therein." This Act was only to continue in force till January 1, 1842; but it was continued by several subsequent Acts.

The statute
of Anne
unrepealed.

Now you will observe that none of these Acts repeal the statute of Anne. They only exempt from its operation the cases provided for by 2 & 3 Vict. c. 37. And this statute does not apply to loans of money *under* £10., nor to cases of *loans on the security of real property*. Mortgages, for instance, remained still governed by the statute of Anne, and void if more than 5 per cent. were directly or indirectly reserved by way of interest. You will now see why I thought it proper to cite cases on the construction of the statute of Anne. If you wish to inquire further regarding that Act, see notes to *Ferrall v. Shaen* (p)

(p) 1 Wms. Saund. 294.

At length the general Act of 17 & 18 Vict. c. 90, has repealed "all existing laws against usury, provided that nothing therein contained shall prejudice or affect the rights or remedies of any person, or diminish or alter the liabilities of any person, in respect of any act done previously to the passing of the Act." It also provides that, where at the time of passing the Act, interest was payable upon any contract for payment of the *legal* or *current* rate of interest, or where interest was by any rule of law then payable upon any debt or sum of money, the same rate of interest shall be recoverable as if the Act had not passed; but this was not to affect the law as to pawnbrokers (*q*).

The next example to which I shall advert arises on the Acts against Gaming. These are exceedingly complex and troublesome; but it is absolutely necessary to direct your attention to them, for questions upon them are continually occurring in practice. Statutes
against
gaming.

The first Act is that of 16 Car. II. c. 7, s. 3, 16 Car. 2, c. 7. which enacts that if any one shall play at any pastime or game, by gaming or betting upon those who game, and shall lose more than the sum of £100. on credit, he shall not be bound to pay, and any contract to do so shall be void.

The 9th Anne, c. 14 (the principal enactment), 9 Anne, c. 14.

(*q*) See the observations of also *Flight v. Reed*, 32 L. J. *Kindersley*. V.C., in *Bond v.* (Ex.) 265. *Bell*, 27 L. J. (Ch.) 233. See

provides, in sect. 1, that all securities for money or any other valuable thing won by gaming or playing at cards, dice, tables, bowls, or other game whatever, or by betting on those who game, or for money lent for such gaming or betting, or lent to gamesters at the place where they are playing, shall be void.

And the 2nd section enacts that any person who shall at a sitting lose the sum or value of £10. may recover it back again within three months; and if he do not, any other person may, together with treble the value—half for himself, and half for the poor of the parish.

Now you will observe that, under these two Acts securities for money lost at gaming, or by betting on the gamesters, or for money lent to them to game with, are illegal.

And you will further observe that, even if no security be given, but the loser pay in cash, still, if the sum lost amount to £10., it may be recovered back again (*r*).

Horse-races.

Now a *horse-race* is a *game* within the meaning of these Acts of Parliament, as you will find laid down in several cases (*s*); and therefore, if the law rested upon these statutes, all losses above £10.,

(*r*) You may consult, on *Robinson*, 3 M. & W. 434.
the construction of these Acts, (*s*) *Goodburn v. Marley*,
Sigel v. Jebb, 3 Stark. 1; Str. 1159; *Blaxton v. Pye*, 2
Brogden v. Marriott, 3 Bing. Wils. 309; and *Brogden v.*
N. C. 88; and *M'Kinnell v. Marriott*, 3 Bing. N. C. 88.

on any such race would be recoverable back by the loser, and would put the winner in danger of the penalties of the statute of Anne, and securities for the payment of any such losses would be *void*. But it was thought that horse-racing, confined within due limits, had a tendency to improve the breed of horses, and thereby promote the interests of the country at large. Acts of Parliament have therefore been passed, providing for this particular object, and excepting such races, to a certain extent, from the provisions of the Gaming Acts. This was first done by stat. 13 Geo. II. c. 19, ^{18 Geo. 2, c. 19.} which legalised matches run at Newmarket, or Black Hambleton, or for the sum of £50. and upwards. But this statute imposed certain restrictions as to the weights which the horses were to carry, which it seemed expedient to repeal; and for that purpose was passed 18 Geo. II. c. 34, s. 11, ^{18 Geo. 2, c. 84.} which, after reciting the restriction of the former statute as to weights, enacts that it shall be lawful for any person to run any match, or to start and run for any plate, prize, sum of money, or other thing of the value of fifty pounds or upwards, at any weights whatever, in the same manner as if the Act of the 13th of Geo. II. had never been made.

This Act, you will at once see, was made merely to take away the restrictions with regard to weight, which had been imposed by the 13th of Geo. II.; but though that was its object, by one of

those strange accidents which are so common in the history of law, the legality of all horse-racing has come to depend upon it.

Forfeiture
of horses
belonging to
same owner.

In the 1st section of the 13th of Geo. II. there was a very strange and unaccountable enactment. It enacted that no person should start more than one horse for the same plate; and that, if he did, all the horses entered by him, except the first, should be forfeited, and recovered by information or action at the suit of a common informer. The law regarding racing, mixed up as it is with the other Gaming Acts, being extremely complex, this portion of it was probably forgotten, and certainly was not universally acted upon, when suddenly, in the years 1839 and 1840, informations were filed for the purpose of recovering several valuable race-horses which had been entered by their owners, along with other horses their property, for the same stakes, in total ignorance of the prohibition of the Act of Parliament.

3 Vict. c. 5.

As soon as this was represented to the Legislature, it interfered for the protection of the defendants, and passed the 3 Vict. c. 5; but that Act, I presume, inadvertantly, instead of repealing so much of the 13 Geo. II. as inflicted penalties, repealed that Act altogether *so far as it related to horse-races*.

Now it had always been supposed that the legality of horse-races depended on the 13 Geo. II., and that the 18th of the same reign was a sub-

sidiary Act, and had merely the effect of taking off restrictions as to weight. And many persons therefore thought that the Act of 3 Vict. c. 5, instead of effecting the object of the Legislature by protecting horse-races, had repealed the only enactment by which they were supported, so that they had been thrown back into the class of games comprised within the statute of Anne, and would be illegal if for a larger stake than £10. At length the question arose, and was argued in a case of *Evans v. Pratt* (t), in which the Court of Common Pleas decided that the words of the 11th section of the 18 Geo. II. c. 34, were large enough to legalise all horse-races for stakes of £50. and upwards. The judgment of *Maule, J.*, gives the law on races as it now stands:—"I think the 11th section of the 18 Geo. II. c. 34, is to be read thus:—'It shall be lawful for any person to run any match for £50. or upwards, at any weights whatsoever, and at any place whatsoever, without incurring the penalties in the Act of 13 Geo. II. c. 19, and without incurring any other illegality under any previous statute.' If that be the true construction of this section, the repeal of the 13 Geo. II. c. 19, will not have the effect of taking away the legality of any race which was legal before the passing of the repealing statute. Then the only question is, whether the 11th section of 18 Geo. II. c. 34, extends to this

(t) 11 L. J. (C. P.) 87 ; 3 M. & G. 759.

case. As that statute is one which takes away penalties, it ought to be largely expounded. The object of the Legislature throughout these enactments has been to encourage the production of a strong and powerful breed of horses; and I think that this was a race calculated to further that object. The only doubt is raised by the language held by Lord *Eldon*, C. J., in *Whaley v. Pajot* (u). The decision in that case merely goes to this, that a race of two horses against one is not a horse-race within the meaning of the statutes. Lord *Eldon* is reported to have said, that 'there seems to be much ground for arguing from the nature of the 16 Car. II. and 9 Anne, that these Acts ought to be construed strictly, in order to enforce the principle on which they are founded, namely, to prohibit all horse-racing, and that the 13 Geo. II. and 18 Geo. II. are, from their nature, to be construed as to encourage the breed of horses, *and to permit that species of horse-racing* only called racing *on the turf*.' Lord *Eldon* does not say, to permit only 'races on the turf,' but 'that species of racing.' I see nothing, however, in the Acts to require so narrow a construction; and I think it is not too much to say, that the statutes extend to all races between two horses running at the same time from one point to another point. It cannot be doubted that such races were assumed to be legal when the

(u) 2 B. & P. 51.

statute of 3 & 4 Vict. c. 5, passed." Such races are therefore legal, and it is settled (x) that a race for £25. a side is a race for £50.

These statutes and cases were reviewed at great length in the case of *Applegarth v. Colley* (y), which decides that a horse-race for a sweepstakes of £2. each is not illegal, although the total amount subscribed and run for amounted to less than £50., inasmuch as neither the statute of Charles (it being a ready money payment) nor the statute of Anne apply to a "race for a sum of money not raised by the parties themselves (that being, in truth, a wager), but given by way of prize by a third person desirous of encouraging racing."

The case of *Bentinck v. Connop* (z) shows that all races are illegal under the statute of Charles, where the stake exceeds £100. and is not paid down, and it upholds the view that the legality of racing depends on the 18 Geo. II. c. 34. *Daintree v. Hutchinson* (a) decides that a dog-race is within the statute of Charles.

The stake is the aggregate of the sums subscribed (b).

But though a race for £50. is thus legalised, a bet on such a race is not so, for it has been

(x) *Bidmead v. Gale*, 4 Burr. 2432.

(y) 10 M. & W. 723.

(z) 5 Q. B. 693.

(a) 10 M. & W. 85.

(b) *Challand v. Bray*, 1 Dowl. N. S. 783.

Bets on races.

decided (c) that a person betting, even on a legal horse-race, is in the same situation as if he had betted upon any other game.

Wagers on
games.

Now there is one point not perhaps precisely forming part of, but strongly bearing on this subject, and of which I must here warn you. When I speak of the statutes of Charles and Anne as rendering bets of a greater amount than £10. recoverable back from the winner, and rendering all securities for bets void, you must understand me to speak of bets on persons gaming; for the words of the former statute are, "by playing at the games or betting on the players," and of the latter and more important one, "betting on the sides of such as game at any of the aforesaid games." All wagers, therefore, are not affected by these statutes, but only wagers upon *games*. Now, a *foot-race* is a *game* within these Acts (d). So are *cards*, *dice*, *tennis*, *bowls*, for they are mentioned in the Acts; and so is *cricket*, though not specified (e); not that there is anything illegal in these amusements themselves, but that the law will not allow the winner of £10. or upwards to receive or retain his winnings, nor will it allow any security for any winnings at them to be enforced. But as to wagers not made upon *games* within the meaning of these Acts of Parliament, if there be nothing illegal or opposed

Bets, not on
games.

(c) *Shillito v. Theed*, 7 2 Wils. 36.

Bing. 405.

(e) *Hodson v. Terrill*, 3 Tyr.

(d) *Lynall v. Longbotham*, 929; 1 C. & M. 797.

to public policy in the subject-matter of the wager, it has been held that there was no statute which affects its validity. This was decided in the famous case of *Good v. Elliott* (*f*), in which the wager, whether a particular person had, before a particular day, bought a waggon, was held legal, and the winner allowed to recover against the loser, in an action, by three judges contrary to the opinion of Mr. J. *Buller*, who advocated the view which probably would have been most consistent with sound policy—namely, that the Courts should refuse to occupy their own time and that of the public by trying such questions. However, the decision in *Good v. Elliott* has been supported (*g*); and indeed the point is now well recognised. And in *Evans v. Jones* (*h*), one of the learned Barons says:—"It is too late now to say that no wager can be enforced at law, though I think it would have been better if they had been originally left to the decision of the Jockey Club." In that particular case the wager was held invalid, on the ground that, under the particular circumstances, its tendency was to obstruct the course of public justice, which is an objection sufficient, as I have already explained in the commencement of the lecture, to invalidate a contract at common law. Much alteration has, however, since taken place, which

(*f*) 3 T. R. 693.

Randall, Cowp. 37.

(*g*) *Hussey v. Crickitt*, 3 Camp. 168; and *Jones v.*

(*h*) 5 M. & W. 82.

it is hoped may be made plain by a few arguments.

It is clear, that, at common law, contracts by way of gaming or wagering were not, as such, unlawful⁽ⁱ⁾. Their illegality depends upon statute law, and after numerous recent alterations, it does not seem, that, in the many statutes on the subject of gaming, any enactment remains, except 6 Will. IV. c. 41, s. 1, hereafter mentioned, whereby they are rendered *illegal*. This, however, is by no means clear, but the state of the law is probably as follows: in 8 & 9 Vict. c. 109, s. 18, it is enacted, that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be *null and void*; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made, provided always that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute for or towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise.

It has therefore been decided that, if an action for money had and received to the plaintiff's use, it

(i) *Thackoorseydass v. Dhondmull*, 6 Moo. (P. C.) 300.

is a good answer to plead that the defendant is a stakeholder, that the money sued for is money deposited in his hands to abide the event on which a wager was made, and is claimed by the plaintiff as the winner, and on no other ground, and that no part of it was a subscription or contribution, or due on any agreement to subscribe or contribute for or towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise (*j*). It is clear, therefore, that the amount of a bet lost at a horse race, and paid by the loser into the hands of a third party, on the promise of the latter to pay it to the winner, cannot be recovered by the winner out of the assets of such third person, if deceased (*k*) ; and that the lawfulness of any game at which any wager is made, does not make the wager lawful (*l*), although if the third person *had* paid it at the loser's request, he might have recovered it from the loser (*m*). Within the enactment that all contracts by way of gaming, or wagering, shall be null and void, the following contract has been classed :—The plaintiff and defendant being in the course of bargaining together for the sale of a quantity of rags, then at the Salford Railway Station, a difference of

(*j*) *Savage v. Madden*, 36 24 L. J. (Q. B.) 277 ; 5 E. & L. J. (Ex.) 178. B. 263.

(*k*) *Beyer v. Adams*, 26 (*m*) *Rosewarne v. Billing*, L. J. (Ch.) 841. 33 L. J. (C. P.) 55.

(*l*) *Parsons v. Alexander*,

opinion arose between them as to the price which the plaintiff had charged the defendant upon a former sale. They agreed to refer the matter to the landlord of the public house at which they were disputing, who suggested that, for his trouble, the loser should pay for a gallon of brandy, and thereupon they signed the following memorandum:—
“Mr. Rourke states, that the goods sold by him to Mr. Short, and afterwards burnt, were invoiced at 5s. 9d. per cwt. ; Mr. Short says, the price was 6s. per cwt. The losing man is to pay for the winner, one gallon of best brandy ; the five tons of rags now lying at Salford Station are to be regulated in price according to the above, viz, Mr. Rourke says they are invoiced at 5s. 9d. ; Mr. Short says, 6s. ; it is also agreed by both parties they are to be charged at 3s. only ; if Mr. Short is wrong, he is to pay for the same 6s.” The landlord decided for the plaintiff, and the defendant paid for the gallon of brandy, which was delivered to the plaintiff. The goods were then invoiced at 6s. per cwt. and sent to the defendant, but he refused to receive them. And the Court held that the contract was by way of wagering, and could not be upheld. In effect, said *Wightman*, J., what took place amounted to a bet between the plaintiff and the defendant upon the accuracy of their recollection as to what the former invoice of goods was, and half the price of the goods was the stake resting upon the determination of an event. If this were not held to be a wager, we

should let in a great many cases which might be concocted for the purpose of evading the statute under the pretence of a *bond fide* sale of goods, when the real intention of the parties was to wager (*n*).

It seems to follow that a bill or note given by the loser to the winner, for money won by gaming, is given without consideration, and cannot be recovered by the latter; but it is clear, that, by force of 6 Will. IV. c. 41, s. 1, such securities, and probably bonds, are still to be treated as given upon an *illegal* consideration (*o*). And although money deposited with a stakeholder to abide the event of any wager cannot be recovered by the winner, yet there is nothing to prevent such a depositor, who repents of his venture and repudiates the wager before the happening of the event, from recovering from the stakeholder the money deposited by him (*p*). Within the proviso with which the before-mentioned enactment concludes, it has been held that a foot-race is included; and that where two agreed to run such a race, and each deposited £10. with a third person, the whole to be paid to the winner, the loser could not recover back his £10. from the stakeholder, the transaction being legal (*q*). But

(*n*) *Rourke v. Short*, 25 L. 5 E. & B. 238.

J. (Q. B.) 196; 5 E. & B. 904.

(*p*) *Varney v. Hickman*, 5 C. B. 271; *Martin v. Heuston*, 24 L. J. (Ex.) 174; 10 Ex. 737.

(*o*) *Hawker v. Halliwell*, 25 L. J. (Ch.) 558; *Fitch v. Jones*, 24 L. J. (Q. B.) 293;

(*q*) *Batty v. Marriott*, 5 C.

the proviso does not extend to a case where two persons ran their horses against each other, the winner to have both horses, there being no subscription or contribution towards any plate, prize, or sum of money to be awarded to the winner (*r*).

Contracts of
insurance.
Wager
policies.

There is, however, one class of *wagers* which require some attention. I allude to wagers in the shape of policies of insurance. An insurance, as you doubtless are aware, is a contract by which, in consideration of a premium, one or more person or persons assure another person or persons in a certain amount against the happening of a particular event; for instance, the death of an individual, the loss of a ship, or the destruction of property by fire. These three classes of policies, upon *ships*, *lives*, and *fire*, are of the most common occurrence; but there is nothing to prevent insurance against other events; for instance, in *Carter v. Boehm* (*s*), one of the most celebrated cases in the Reports, Lord *Mansfield* and the rest of the then Court of Queen's Bench supported a policy of insurance against foreign capture effected in a fortress. Now, this contract of insurance, though one of the most beneficial known to the law, since it enables parties to provide against events which no human skill can control, to provide, for instance, against the ruin of a family by the

B. 818; *s. v. Parsons v. Alexander*, supra. See 16 & 17 Vict. c. 119; *Doggett v. Cat-terns*, 34 L. J. (C. P.) 46.

(*r*) *Coombs v. Dibble*, 35 L. J. (Ex.) 167.
(*s*) 3 Burr. 1905.

sudden death of a parent, the ruin of a merchant by the loss of his venture at sea, or of a manufacturer by the outbreak of a fire on his premises, though productive, therefore, of most beneficial consequences to society, yet is very liable to be abused, and made an engine of mere gambling ; for instance, A. insures B.'s life ; *i.e.*, he pays so much a year, or so much in the lump, to some one who is to pay him so much upon B.'s death. If B. owes him money, and his object is to secure himself, it is a *bonâ fide* insurance ; but if B. is a mere stranger, in whose life he has no interest, it is a mere wager. In order to prevent the contract of insurance from being thus abused, the statute 14 Geo. III. c. 48, prohibiting wager policies, as they are called, altogether, prevents a man from insuring an event in which he has no interest, and, where he has an interest, but not to the extent insured, prohibits him from recovering more than the amount of his interest. The effect of this Act, in a word, is to invalidate wagers framed in the shape of policies of insurance—thus, a wager on the price of Brazilian shares framed like a policy was held invalid (*t*). But where the transaction would not be commonly understood to be a policy of insurance, and therefore would not fall within the words of the stat. 14 Geo. III. c. 48, taken in their ordinary acceptation, the Courts

(*t*) *Paterson v. Powell*, 9 Bing. 320.

would probably not consider it as within this Act (u).

This Act applies to all subjects of insurance except marine risk, and these are provided for by the insertion of a similar prohibition contained in 19 Geo. III. c. 37, enacting, that no insurance shall be made on any ship belonging to his Majesty or any of his subjects, or on any goods, merchandize, or effects, laden or to be laden on board thereof, interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the assurers. And it is decided that one who has any interest may be insured to the extent of it, and any one may be considered to have an interest, who may be injured by the risks to which the subject-matter is exposed, or who but for such risks would have an advantage in the ordinary and probable course of things (x).

It having been enacted by the statute 14 Geo. III. c. 48, that no insurance shall be made by any person on the life of any person, or on any other event whatsoever, wherein the person for whose use, benefit, or on whose account such policy

(u) *Cook v. Field*, 15 Q. B. 475.

(x) *Lucena v. Craufurd*, 2 B. & P. N. R. 300; *Briggs v. Merchant Traders' Shipping Assurance Association*, 13 Q. B. 167; see *Dalby v. India*

and *London Life Ass. Co.*, 24 L. J. (C. P.) 2; 15 C. B. 365, in Ex. Ch.; see the note to *Godsall v. Boldero*, 2 Smith L. C., 5th ed. See *Hawkins v. Coulthurst*, 33 L. J. (Q. B.) 192.

shall be made, shall have no interest, and that every assurance made contrary to the intent thereof shall be null and void, it is important to ascertain what is to be considered as an interest in the event within the meaning of this statute. It is clear that a creditor has an interest in the life of his debtor (*y*), that a trustee may insure for the benefit of his *cestui que trust* (*z*), that a wife has an interest in her husband's life (*a*), and that a man may assure his own life, which is the common case of every day's experience ; but he cannot evade the statute by doing so with the money of another, which other is to derive the benefit of the assurance, and has no interest in his life, since so to do would be virtually enabling a person to effect an assurance on an event wherein he has no interest (*b*). It is also required that in every policy on the life of another the name of the person really interested when the policy is effected, or for whose benefit it is effected, must be inserted as the person interested, and the omission or erroneous statement of the person interested, avoids the policy whether a wagering policy or not (*c*).

(*y*) *Von Lindenau v. Desborough*, 3 Car. & P. 353 ; *Cooke v. Field*, 15 Q. B. 460.

(*z*) *Tidswell v. Ankerstein*, Peake, 151 ; *Craufurd v. Hunter*, 8 T. R. 13.

(*a*) *Read v. Royal Exchange Ass. Co.*, Peake, Ad. C. 70.

(*b*) *Wainwright v. Bland*, 1 M. & W. 32 ; *Shilling v. Accidental Death Ass. Co.*, 26 L. J. (Ex.) 266 ; 2 H. & N. 42 ; 27 L. J. (Ex.) 17.

(*c*) 14 Geo. 3, c. 48, s. 2 ; *Hodson v. Observer Life Ass. Sy.*, 26 L. J. (Q. B.) 303 ; 8 E. & B. 240.

LECTURE VII.

STOCK-JOBGING ACT.—THE LORD'S DAY ACT.—
SIMONY.—BILLS OF EXCHANGE FOR ILLEGAL
CONSIDERATION. — RECOVERY OF MONEY PAID
ON ILLEGAL CONTRACTS.

THERE are some other heads of statutable illegality which are frequently set up as affording an answer to any attempt to enforce contracts vitiated by them. I directed your attention, on the last occasion, to the defences which arise under the usury laws, and the laws enacted for prevention of gambling ; noticing the invalidity of certain wagers not falling within the statutes against gaming, by reason of the Acts of Parliament which prohibit wagering insurances. The first class of cases to which I will now advert, consists of those contracts which fall within the prohibition of what are called the Stock-jobbing Acts.

The Stock-
jobbing Acts.

The Act against stock-jobbing is the 7th of Geo. II. c. 8, which was a temporary Act, but was continued and made perpetual by the 10th of the same reign, c. 8. And it enacts, in substance—for the section is a long and verbose one—but, in substance, it enacts, that all contracts in the nature of

wagers, relating to the then present or future price of stock, or other public securities, shall be void ; and that all premiums paid on any such contracts shall be recoverable back again by an action of debt for money had and received, whereby the plaintiff's action accrued to him, according to the form of the statute.

Contracts in the nature of wagers, as those words are used in this statute, may very well be understood to comprehend cases where the vendor did not possess the stock and the purchaser did not intend to receive it, but those parties only intended to pay or receive, when the day for performing the contract should arrive, the difference between the actual price on that day, and the price which they agreed upon in their contract (a). But when the vendor was really possessed of the stock bargained to be sold, and intended to transfer it, and the purchaser intended to receive the stock, such contracts are not in the nature of wagers, and are not forbidden by the statute (b). "It has been said," observed Lord *Abinger*, C. B., in delivering judgment in *Mortimer v. M'Callan* (c), (a case where the plaintiff sold and transferred stock not being

(a) *Nicholson v. Gooch*, 25 L. J. (Q. B.) 137 ; 5 E. & B. 999 ;¹ *Barry v. Crosskey*, 2 Johnstone & H. 1. *lan*, 6 M. & W. 58 ; *Ex parte Phillips v. Morgan*, 30 L. J. Btcy. 1.

(b) *Sanders v. Kentish*, 8 T. R. 162 ; *Child v. Morley*, Id. 610 ; *Mortimer v. M'Cal-* (c) Id. 70 ; 7 M. & W. 20 ; S. C., on demurrer. But see the same case in Ex. Ch., 9 M. & W. 636.

possessed of it at the time, the real owner transferring it for him,) "that the plaintiff could not enforce his contract for the sale of this stock, because he had none at the time of the contract. That general proposition certainly is not true. How many merchants are there who make contracts to sell things which they are not in possession of. Can it be doubted, that a man who has made a contract to sell that which he is not then possessed of, if he obtain means to perform that contract, and to deliver the thing sold by his own hands or by the agency of another, is entitled to recover the price of it? But it is said, that, by reason of the prohibition in the Act of Parliament, he could not sell this stock. Now, that Act was made for the purpose of preventing what is declared to be an illegal trafficking in the funds by selling fictitious stock, merely by way of differences; but it never was intended to affect *bond fide* sales of stock, or to say, if a man undertakes to sell stock to another, and transfers the actual stock and delivers it to him, and he accepts the stock, that is not a lawful transaction. That is not a case within the statute at all. True, the plaintiff had not the stock at the time it was purchased, but he had it before it was invested in the name of the defendant; and whether he transferred it to the defendant himself, or procured another person to transfer it for him, makes no difference. In point of fact, he procured stock, and through his instrumentality

the defendant became possessed of the stock ; and therefore, whether he had it transferred into his own name first, and then re-transferred it, makes no difference."

By similar reasoning, it will appear that where the stock is only potentially in the possession of the vendor, and a real transfer is intended, the statute does not apply (*d*). It is also held that the statute refers only to those stocks which are ordinarily considered as the public funds or securities, for which there is a warranty by the Government that the dividends and capital shall be paid (*e*). Thus, shares in incorporated or joint-stock companies in this country, not being guaranteed by Government, do not fall within the stat. 7 Geo. II. c. 8 (*f*). In accordance with this principle, it has been decided, on the construction of this Act of Parliament, that it was not intended to apply to any except British securities, and, consequently, that it does not prohibit gambling in the foreign funds. The question was long contested, but it has been finally decided in many cases (*g*). But if in fact the one party did not intend to transfer, or the other to receive the stock, whether it were foreign or British, the transaction, although not forbidden by the statute

(*d*) *Oliverson v. Cole*, 1 M. & Gr. 355.
Stark. 496.

(*e*) Per the Master of the Rolls, *Williams v. Trye*, 23 L. J. (Ch.) 860. (*g*) *Wells v. Porter*, 2 Bing. N. C. 722 ; *Oakley v. Rigby*, Id. 732 ; *Robson v. Fallnes*, 3 Bing. N. C. 392 ; *Elsworth v.*

(*f*) Id. *Hewitt v. Price*, 4 Cole, 2 M. & W. 31.

we have just been considering—the stock not being that of the British Government—falls within the recent statute, 8 & 9 Vict. c. 109, s. 18, before mentioned, which enacts that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void (*h*).

Now, whether the subject-matter of the contract consists of public securities, as before mentioned, or of other matters, but the contract itself is in the nature of a wager, it is void. If, therefore, a contract be made to pay the difference which might become due between the plaintiff and the defendant on the settling day, on the sale of consols, it is one upon which the plaintiff cannot recover (*i*). It will therefore appear plain, upon comparing the prohibition in this statute with what has before been said upon the effect of legal prohibitions upon contracts (see ante, p. 192), that if it be impossible to give effect to a contract of the kind we are now treating of, without having recourse to some wager forbidden by the Stock Jobbing Act, such contract cannot be enforced at all. This rule has already been illustrated in the case of *Cannan v. Bryce* (ante, p. 19), and it follows evidently from it that bills or notes given to secure money advanced for such a purpose cannot be recovered by any person guilty of the illegal contract before mentioned, or by any

(*h*) *Grizewood v. Blane*, 11 C. B. 538 ; *Hill v. Campbell*, Guildhall, Feb. 1854, Q. B. (*i*) *Sawyer v. Langford*, 2 C. & K. 697.

This statute of 7 Geo. II. c. 8, is repealed by 23 Vict. c. 28 ; but the cases here cited are valuable for illustrating 8 & 9 Vict. c. 109, s. 18. It seems that if the money be actually paid on such contracts it cannot be recovered back.

The Lord's Day Act.

(k) *Brown v. Turner*, 7 T. 2 B. & C. 573.
R. 630. (m) *Steers v. Lashley*, 6 T.
(l) *Amory v. Meryweather*, R. 61.

five shillings. The contracts prohibited by this statute are, you will observe, not every contract made on Sunday, but contracts made in the exercise of a man's *trade or ordinary calling*: thus, it has been decided in *R. v. Whitnash* (n), that a contract made on Sunday by a farmer for the hire of a labourer, is valid. The Court decided, in the first place, that a farmer was not a person within the meaning of the statute at all, for that the meaning of the words "tradesman, artificer, workman, labourer, or other person whatsoever," was to prohibit the classes of persons named and other persons *ejusdem generis*, of a like denomination; and they did not consider a farmer to be so (o). And, secondly, they held that even if the farmer were comprehended within the class of persons prohibited, the hiring of the servant could not be considered as *work done* in his *ordinary calling*, for, said Mr. J. Bayley, "those things which are repeated *daily* or *weekly* in the course of trade or business are parts of the ordinary calling of a man exercising such trade or business; but the hiring of a servant for a year does not come within the meaning of those words."

Rule for
construing
statutes
*ejusdem
generis*.

The former of the two points decided in this case furnishes a very good exemplification of the celebrated rule of construction as applied to statutes, namely, that where an Act mentions particular

(n) 7 B. & C. 596; *R. v. Silvester*, 33 L. J. (M. C.) 79. (o) *R. v. Silvester*, 33 L. J. (M. C.) 79.

classes of persons, and then uses *general* words, such as "*all others*," the general words are restrained to persons of the like description with those specified (*p*). And, therefore, where a statute (*q*) recites that the Lord's day is much broken and profaned by carriers, waggoners, carters, wainmen, butchers, and drovers of cattle, and then enacts that those persons (naming them) shall not, by themselves, or any other, travel upon the Lord's day, and the Lord's Day Act contains the words previously recited, it has been determined that the owner or driver of a stage coach is not included within the words "other person whatsoever," forbidden to exercise his calling on the Lord's day. The same construction was put upon the Lord's Day Act in a subsequent case, that of *Peate v. Dicken* (*r*), where it was decided, *first*, that an attorney was not within the description of persons intended by the statute; and *secondly*, that if he were, an agreement made on Sunday to become personally responsible for the debt of a client, could not be said to fall within his *ordinary calling*.

But perhaps the second point illustrated by these cases is put in the clearest light by those of *Drury v. De Fontaine* (*s*) and *Fennell v. Ridler* (*t*), in the

(*p*) See *Sandiman v. Breach*, 7 B. & C. 96; *Queen v. Nevill*, 8 Q. B. 452. See *Bishop v. Elliott*, 24 L. J. (Ex.) 229; 11 Ex. 113.

(*q*) Stat. 3 Car. 1, c. 1.

(*r*) 1 Cr. M. & R. 422.

(*s*) 1 Taunt. 131.

(*t*) 5 B. & C. 406.

former of which cases it was considered that the sale of a horse on a Sunday by a person not being a horse-dealer, was not void, such sale not being within the ordinary calling of the plaintiff; and in the second, that a horse-dealer could not maintain an action upon a contract for the sale and warranty of a horse bought by him on a Sunday, it being obvious that, in doing so, he was exercising the business of his ordinary calling. In accordance with these cases, it has been decided that one tradesman giving another, on the Lord's day, a guaranty for the faithful services of a traveller is not, in doing so, exercising his ordinary calling (*u*); and the same conclusion was come to in the last case upon the subject, where it was decided that a recruiting officer enlisting a soldier on a Sunday is not executing his ordinary calling on the Lord's day (*x*).

Sunday sales.

The cases in which the Act is most frequently sought to be applied are those of sales, of which you may see a remarkable instance in *Simpson v. Nichols* (*y*). This was an action for goods sold and delivered. The defendant pleaded that they were sold and delivered by him to the plaintiff in the way of his trade on a Sunday, contrary to the statute; the plaintiff replied, that, after the sale and delivery of the goods, the defendant kept them for his own use, without returning or offering to return them,

(*u*) *Norton v. Powell*, 4 M. & Gr. 42. See *Scarfe v. Morgan*, 4 M. & W. 270.

(*x*) *Wolton v. Gavin*, 16 Q. B. 48.

(*y*) 3 M. & W. 240.

and had thereby become liable to pay as much as they were worth. This replication was considered to be no answer at all to the plea. A case had been cited in the argument (z), where the defendant, having purchased a heifer of a drover on a Sunday, and having afterwards kept it and expressly promised to pay for it, was held liable by virtue of that promise. But Mr. Baron *Parke* observed (a) that, as the property in the goods passed by delivery, the promise made on the following day to pay for them could not constitute any new consideration, and therefore he doubted whether that case could be supported in law. Perhaps, however, the Court considered that case as within the rule mentioned ante, page 187, and that the express promise there mentioned might revive the precedent consideration, which might have been enforced at law through the medium of an implied promise, had not the party been exempted by the positive rule of law forbidding such a contract on the Lord's day (b).

Yet, from the application of the Act to these cases even there are some exceptions ; some created by the Act itself, which permits food to be sold in inns and cookshops to persons who cannot be otherwise provided, and for the sale of milk at certain

(z) *Williams v. Paul*, 6 Bing. 653.

(b) See *Scarfe v. Morgan*, 4 M. & W. 270. See per

(a) *Simpson v. Nichols*, 5 M. & W. 702, note. *Bosanquet, J.*, 6 Bing. 655.

hours ; others by 10 & 11 Will. III., c. 24, s. 14, which legalises the sale of mackerel before and after divine service ; others by 6 & 7 Will. IV., c. 37, which allows *bakers* to carry on their business to a certain extent and under certain restrictions, see s. 14, and, indeed, even before the passing of that Act or of the 34 Geo. III., c. 61, on the same subject, it had been decided that a baker baking provisions for his customers was out of the purview of the Act altogether, as being a work of necessity (c) ; and there are other exceptions created by other particular enactments—as, for instance, in case of hackney carriages.

Simony.

Another class of contracts falls within the prohibition of the Acts aimed against *simony*. There are two statutes on this subject : the 31 Eliz. c. 6, and 12 Anne, c. 12 ; the former of which enacts that if any *patron*, for any corrupt consideration, by gift or promise, directly or indirectly, shall present or collate any person to any ecclesiastical benefice or dignity,—such presentation shall be void, the presentee shall be incapable of enjoying the benefice, and the Crown shall present to it (d).

12 Anne, s. 2,
c. 12.

The other statute is that of 12 Anne, s. 2, c. 12, which enacts, that if any person, for money or profit, shall procure in his own name, or in the name of any other, the next presentation to any

(c) See *R. v. Cox*, 2 Burr. 785 ; *R. v. Younger*, 5 T. R. 449.

(d) *Goldham v. Edwards*, 24 L. J. (C. P.) 189 ; 18 C. B. 389.

living ecclesiastical, and shall be presented there-upon, the contract is declared to be simoniacal, and the presentation is to devolve upon the Crown.

It was decided on the construction of the former 31 Eliz. c. 6. Act, that of Elizabeth, very soon after it passed—that a contract to purchase a living actually vacant at the time of the purchase was a simoniacal contract, and avoided by the operation of the statute. That was taken for granted in *Baker v. Rogers* (e), which was decided but a very short time after the passing of the Act; but still, although, after the statute of Elizabeth, it was admitted, that to contract for the right to present to a church *actually void*, was simony, yet, it was also held, that it was not simony to purchase the next presentation at a time when the church was full, and it was therefore uncertain when that presentation would accrue (f). And so the law continues to be to this day, with a qualification introduced by the statute of Anne, the nature of which I am about to explain to you.

The statute of Elizabeth, and the decisions upon it, had, as I have just said, established two points; Effect of the statute of Elizabeth. first, that the right to present to an actually void benefice could not be purchased; secondly, that the right of next presentation might be so, provided that the living was full at the time of the contract. Certain clergymen took advantage of this state of the law to purchase next presentations, with the

(e) Cro. Eliz. 788.

Smith v. Shelborne.

(f) See Cro. Eliz. 685,

intention of presenting themselves upon the occurrence of a vacancy. This practice, being considered highly indecorous, the statute of the 12th of Anne was passed to put a stop to it, and that Act renders it illegal and simoniacal on the part of a *clergyman* to purchase the next presentation to a living actually full, and to present himself, leaving the right of a laymen to do so just as it stood before under the Act of Elizabeth.

The operation of these two statutes was elaborately discussed—first in the Queen's Bench, and subsequently in the House of Lords—in the great case of *Fox v. Bishop of Chester* (g). In that case the incumbent of a living was exceedingly ill, and upon his death bed. The proprietor of the advowson and another person being aware of this, and believing that his death was at hand, agreed for the sale of the next presentation, and in order to carry the agreement into effect, executed a deed a few hours only before his death, which purported to convey the advowson to the vendee for ninety-nine years, but contained a proviso for reconveyance as soon as one presentation should have been made. After the death of the incumbent, the vendee under this deed presented a clergyman who was in no way privy to the bargain; and, consequently, the only question was as to the legality of the bargain itself, and it was strongly urged that it was void;

(g) 2 B. & C. 635; and 6 Bing. 1.

for, it was contended, that the transaction was a fraud upon the statute of Elizabeth, since, under the circumstances, the living was for every *practical* purpose vacant at the time of the contract, although it was possible that the incumbent might linger on for a few hours after the delivery of the deed. And such was the opinion of the Court of Queen's Bench, who delivered their judgment accordingly. But it was carried to the House of Lords, and there reversed according to the unanimous opinion of the other judges, and of Lord *Eldon*, who was at that time Chancellor.

Connected with, and, indeed, forming a part of this branch of the subject, are the decisions with regard to *resignation bonds*, the history of which is extremely curious.

It had become a very common practice when the patron of a living had a son intended for the Church, and the living happened to become vacant during the young man's minority, for the patron to present a clergyman, who entered into an agreement to resign as soon as the patron's son should be of age to hold the preferment. These contracts were usually made by way of bond, conditioned to resign on the contingency happening, and which, from the nature of the transaction, acquired the name of *Resignation Bonds*. At first a doubt was entertained whether these bonds did not offend against the provisions of the Act of Elizabeth, since the clergyman who executed such an instrument could

Resignation
bonds.

hardly be said to have been presented gratuitously, inasmuch as he agreed to bind himself in the penal sum as a condition precedent to his obtaining the preferment, and inasmuch as, in the case of his refusing to resign, and allowing the penal sum to be forfeited, he actually would have given up that sum of money for the sake of holding the living. However, in *Johnes v. Lawrence* (h), first the Queen's Bench, and then the Exchequer Chamber, decided that such an instrument was good : and the reason assigned for this was, that a father is bound by nature to provide for his son ; and therefore, that, though the clergyman was presented under an agreement, yet it was not an agreement upon any corrupt consideration, but more resembled the case of a bond to resign in case of non-residence or of taking any other living which had both been decided to be for the good of the public, and free from any objection on the score of simony. But still another question remained, for in course of time it became usual to exact from the clergyman a bond conditioned to resign—not on the patron's son or any other particular person becoming qualified to hold the living—but to resign *generally* at the request of the patron whenever he should think proper to signify it. These bonds, which were called *General Resignation Bonds*, stood, it is obvious, on a different footing from the former ones,

(h) Cro. Jac. 248.

for they reduced the clergyman to a state of complete dependence on the will and pleasure of the patron. However, in *Ffytche v. The Bishop of London* (i), which was finally decided in the year 1783, first the Court of Common Pleas, and then that of the King's Bench, decided that such bonds were valid. But, on a writ of error to the House of Lords, that decision was reversed by a majority of lay peers voting against the expressed opinion of a majority of the judges. After that period there was for a long time a strong inclination on the part of the Courts to confine the authority of that decision of the peers to cases precisely similar to itself, as you will see from the judgments in *Bagshaw v. Bosley* (k), *Partridge v. Whiston* (l), *Newman v. Newman* (m). However, at last, in the year 1826, the matter came again before the House of Lords in the case of *Fletcher v. Lord Sondes* (n), under the following circumstances.

An action was brought in the Queen's Bench by Lord Sondes against the Reverend William Fletcher upon a bond of £12,000. The condition was not to commit dilapidations, and to resign within a month after request the rectory of Kettering, in the county of Northampton, to which Lord Sondes then presented him, in order that his Lordship might be enabled to present one of two younger brothers, whose names

(i) 1 East, 487.

(k) 4 T. R. 78.

(l) Id. 359.

(m) 4 M. & Sel. 66.

(n) 3 Bing. 501, in Dom. Proc.

the condition specified. Upon this bond, judgment was allowed to go by default ; and a writ of error being brought in the House of Lords, the judges were called on to deliver their opinions, which they all did with the exception of Mr. J. *Bayley*, Mr. J. *Holroyd*, and Mr. J. *Littledale*. There was a difference of opinion amongst them, and they delivered their opinions therefore seriatim—the judges who thought the bond valid being L. C. J. *Best*, Mr. J. *Burrough*, and Mr. J. *Gaselee* ; those who thought it invalid being the L. C. J. *Abbott*, C. B. *Alexander*, Mr. J. J. A. *Park*, B. *Garrow*, B. *Graham*, and B. *Hullock*. The Chancellor agreed with the majority, and the judgment of the Court below in favour of the plaintiff was reversed. Now, the bond in this case was not a general resignation bond. It was a special one in favour of the obligee's two brothers. And the effect of this decision was, not only to establish the decision in *The Bishop of London v. Ffytche*, but to overturn the decisions which had previously taken place in favour of special resignation bonds, and render all bonds conditioned for the resignation of a clergyman illegal. But as the consequences of this would have been exceedingly hard upon persons who had executed special resignation bonds at the time when they were looked upon as legal, the Archbishop of Canterbury immediately brought in a bill which he laid on the table of the House as soon as the Lords had assented to the Chancellor's motion to reverse the judgment of the

Queen's Bench in *Fletcher v. Lord Sondes*, and which afterwards passed into law. It is the 7 & 8 Geo. IV., c. 25, which confirms such bonds and contracts if made before the 9th of April, 1827, the day of the decision in *Fletcher v. Lord Sondes*, for resignation in favour of one, or one of two specified persons. And thus the law continued; all general bonds of resignation being void, and special ones in favour of one person, or one of two persons, good if before April 9th, 1827, and void if subsequent to that day, until the passing of the 9 Geo. IV., c. 94, which rendered special resignation bonds and contracts entered into after the passing of that Act good, if in favour of one, or one of two persons standing in the relation of uncle, son, grandson, brother, nephew, or grand-nephew to the patron, by blood or marriage.

9 Geo. IV. c. 94.

Thus stands this curious branch of law. Resignation contracts prior to April 9th, 1827, being governed by 7 & 8 Geo. IV., c. 25, conjointly with the statutes of Elizabeth and Anne; between that day and the passing of 9 Geo. IV., c. 94, by the statutes of Anne and Elizabeth, as explained in *Fletcher v. Lord Sondes*; and, subsequently, by the 9 Geo. IV., c. 94, in conjunction with the statutes of Anne and Elizabeth.

Another class of illegal contracts, of not unusual occurrence, consists of those which are invalid, on the ground that they amount to illegal attempts to charge an ecclesiastical benefice. The obvious

Illegal charges on benefices.

impolicy of allowing the provision made by law for the support of the church to be diverted to secular purposes, occasioned the enactment of the 13 Eliz. c. 20, which directs that all *chargings* of benefices other than rents reserved upon the leases which the law allows to be made should be void. This Act was repealed by 43 Geo. III., c. 84, but revived again by the repeal of the latter Act by 57 Geo. III., c. 99 (o). The cases have mostly arisen on contracts made for the purpose of charging an annuity granted by a clergyman upon his benefice. These contracts are held void (*p*), and, where it appears on the face of a warrant of attorney given by a clergyman, that his intention in executing it was that the benefice should be sequestered towards the liquidation of an annuity or other charge, the Court will set it aside (*q*); but they will not do so where no intention to create such a charge appears on the face of the warrant of attorney itself, though its effects may and probably will be to occasion an execution to issue, under which the profits of the benefice will be sequestered (*r*).

(o) *Shaw v. Pritchard*, 10 B. & C. 241. See 1 & 2 Vict. c. 106; *Hawkins v. Gathercole*, 6 De G. M. & G. 1; 24 L. J. (Ch.) 332.

(p) See *Mouys v. Leake*, 8 T. R. 411; *Alchin v. Hopkins*, 1 Bing. N. C. 99; *Flight v. Salter*, 1 B. & Ad. 673;

Walker v. Crofts, 20 L. J. (Ex.) 257; 6 Ex. 1, S. C.

(q) *Saltmarshe v. Hewett*, 1 A. & E. 812; *Newland v. Watkins*, 9 Bing. 113. See *Hawkins v. Gathercole*, 24 L. J. (Ch.) 332.

(r) *Bendry v. Price*, 7 Dowl. 753; *Colebrook v.*

A contract may also be illegal by contravening the very useful statutes which prescribe a uniformity of weights and measures in the United Kingdom. By the 5 Geo. IV., c. 74, s. 23, a great number of statutes upon this subject were repealed; and by this Act, and by the 5 & 6 Will. IV., c. 63, the weights and measures of the country are now regulated. By sect. 6 of the latter Act the Winchester bushel, the Scotch ell, and all local or customary measures are abolished, and every person who shall sell by any denomination of measure, other than one of the imperial measures or some multiple or aliquot part thereof, shall be liable to a penalty not exceeding 40s. for every sale (s): provided that this Act shall not prevent the sale of any articles in any vessel, where such vessel is not represented as containing any amount of imperial measure, or of any fixed, local, or customary measure theretofore in use. By sect. 7, heaped measure is abolished, and all bargains, sales, and contracts which shall be made by it, are rendered null and void; and articles which before this Act were usually sold by it, may be sold by a measure, filled as nearly to the level of the brim as their size and shape will admit, or by weight, s. 8. By sect. 9, coals must be sold by weight, and all

Illegal
measures.

Layton, 4 B. & Ad. 578; (s) See 27 & 28 Vict. c. 117, to render permissive the use of the metric system.
Moore v. Ramsden, 7 A. & E. 898; *Sloane v. Packman*, 11 M. & W. 770.

articles, except the precious metals, and precious stones and drugs, must be sold by Avoirdupois weight, but the precious metals and precious stones may be sold by Troy weight, and drugs, when sold by retail, by Apothecaries' weight—s. 10. See 16 & 17 Vict. c. 29. By sect. 11, the stone is to consist of 14 pounds, the hundred weight of 8 stones, and the ton of 20 hundred weight. It has been decided that this statute does not apply to contracts to be performed abroad (*t*), but only to contracts where the goods are to be weighed or measured in this country; and it has been held, that, even in this country, a contract for the sale of iron by the ton long weight, consisting of 20 hundred weights, of 120 lbs. each, is not illegal, it being considered that the object of the statute, to be collected from it, was to abolish local and customary weights and measures, and to establish uniformity, and consequently did not apply to a weight like the long hundred, which was not a local or customary weight, but in use all over the country (*u*).

In some cases also joint-stock companies are not able to make a legal contract, but this will be treated of hereafter.

Assignable
contracts.

I have now touched upon the classes of contracts invalidated by express enactment, which are of most frequent practical occurrence, and it remains to

(*t*) *Rosseter v. Cahlmann*, (Ex.) 292; 10 Ex. 119, S. C.; 8 Ex. 361; 22 L. J. (Ex.) 128. 24 L. J. (Ex.) 259; 11 Ex.

(*u*) *Jones v. Giles*, 23 L. J. 393, Ex. Ch.

mention one point, also arising from a late statute, which has done away with a distinction which was formerly found an exceedingly troublesome one, and frequently very unjust in its operation.

You are probably aware that the general rule of the law of England is, that a *contract* is not *assignable*; that is, that a man who has entered into a contract cannot transfer the benefit of that contract to another person, so as to put that other person in his own place, and entitle him to maintain an action upon it in case of its non-performance. But you are probably also aware that there are some contracts which, by the operation either of a statute or of some peculiar rule of commercial law, are exempted from the operation of the above rule, and rendered transferable in the same way as any other property from man to man.

Such are bills of exchange, which, by the law merchant, are transferable by *indorsement* if payable to order—by *delivery* if payable to bearer. Such, too, are promissory notes, which, by the statute 3 & 4 Anne, c. 9, are placed on the same footing as bills of exchange. Now, where some one of these instruments had been made upon an illegal consideration: where, for instance, a bill of exchange was accepted for an illegal gambling debt, it is obvious that no action could be maintained between the original parties to it; for instance, in the case I have just put, by the drawer of such a bill against the acceptor of it; for, as between them, it is the

Bills of
exchange
given for
illegal
considerations.

common case : they both knew of the illegality, and nevertheless, with their eyes open, made it the consideration of their contract. But where the instrument had gone out of the hands of the person to whom it was originally given, and had got into the hands of some third person, the case is very much altered; for he might not, and probably did not, know of any illegality; and if he did not, it was hard that he should lose the benefit of that for which he had paid, in consequence of the illegal act of other persons, in which he did not participate, and of which he did not know. For instance, to take again the same example :—A. loses £100. to B. at whist, and accepts a bill for the amount. If B. afterwards sues A. on that bill, and A. pleads the illegality, this, though not in conformity with the principles of honour, cannot be said to be a hardship upon B., for he knew when he sat down to play, and he knew when he drew the bill, that he could not enforce such a demand. But suppose, instead of himself suing on the acceptance, he had procured C. to discount it, and had indorsed it to him, and C. had paid full value for it, and knew nothing of the gaming debt for which it was given, in such a case it would be an exceedingly hard thing indeed to prevent C. from recovering the amount from the acceptor. Yet, notwithstanding this, there were till lately several cases in which he would have been precluded from doing so.

The law stood thus :—Whenever illegality de-

depended on the common law, or on an Act of Parliament which did not in express terms render the security *void*, *there* the Courts applied the rule which reason and justice dictate, and held that the person who had given value for the security, and had taken it without notice that it was effected by an illegality, was entitled to recover upon it. There were, however, some cases in which, by the positive enactments of particular statutes, the security was rendered *void*. Such, for instance, was an acceptance of the description I have just supposed, given for a gaming debt. Such, also, at one period, was a bill or note given upon a usurious consideration. But the hardship in the case of usury was found so great, that a particular Act (58 Geo. III. c. 93), was passed in order to put an end to it. And at length, stat. 5 & 6 Will. IV. c. 41, has altogether abolished the distinction and the grievances which it occasioned, by enacting that such instruments shall be no longer *void*, but shall be deemed and taken to have been given for an *illegal consideration*; the consequence of which is, that they are still void as between the original parties, and also as against all persons who have taken them with the notice of illegality, or after they had become overdue, or without giving value for them; but good in the hands of every person who has given value, and taken the instrument, before it was due and *bonâ fide* (x).

Where illegal bills were void in hands of an innocent indorsee.

(x) See *supra*, p. 248.

Although since the passing of this statute, many alterations have been made in the law of gaming, yet the stat. 5 & 6 Will. IV. c. 41, is still in force (y), and the law is still as just described.

No action lies
to recover
money paid
on an illegal
contract.

There is one other point which I will notice before altogether leaving the head of illegality. I have hitherto spoken of illegality as avoiding a contract, and of course operating by way of defence to any action brought upon the contract which it affects. But put the case that an illegal contract has been in part performed—that money, for instance, has been paid in pursuance of it—*no action will lie to recover that money back again*. At an early period of the law it was thought that such an action might be perhaps maintainable upon the ordinary principle, that an action will lie to recover back money which has been paid on a consideration which has failed. Thus, for instance, in the common case of an insurance, supposing that I insure a ship during a voyage, and she never sails upon it, I should be entitled to recover back the money as paid upon a consideration which had failed: for the consideration for my paying the premium was the risk the underwriter was to take upon himself; but as the risk was to be contemporaneous with the voyage, and as that never commenced, so neither

(y) 8 & 9 Vict. c. 109, within the equity of this statute, *Hawker v. Hattewill*, 2 a. 15. See Bayley on Bills, by Dowdeswell, 524. It has been held that bonds are Sm. & Giff. 194.

did the risk, and, consequently, nothing was ever given in exchange for the money. So, in the ordinary case of an action for a deposit. If A. sells an estate to B., B. paying a part of the purchase-money as a deposit, if A. afterwards prove unable to make out a title, B. may recover back the money deposited for the consideration ; for the sale has become abortive. Such are the common cases, and the common rule : where money has been paid upon a consideration which totally fails, an action will lie to recover it back again. But it is otherwise where the contract was an illegal one. Where money is paid in pursuance of an illegal contract, the consideration of course fails, for it is impossible for the party who has paid the money to enforce the performance of the illegal contract. Still, no action will lie to recover it back again. The reason of this is, that the law will not assist a party to an illegal contract. He has lost his money, it is true, but he has lost it by his own folly in entering into a transaction which the law forbids. You will see instances of this in the cases cited below (z), the last of which is the very case I put, that of an insurance, in which, if the risk be not run, the premium may be recovered back again ; but in *Lubbock v. Potts* the insurance was an illegal one, and it was therefore held that, though it could not have

(z) *M'Kinnell v. Robinson*, 3 M. & W. 441 ; *Howson v. Hancock*, 8 T. R. 575 ; *Brown- ing v. Morris*, Cowp. 790 ; and *Lubbock v. Potts*, 7 East, 449.

been enforced, the insured should not recover back the premium. The point is forcibly put by L. C. J. *Wilmot*, in his celebrated judgment in *Collins v. Blantern*, which I have several times cited from 2 Wilson, 341. "Whoever," says his Lordship, "is a party to an unlawful contract, if he have once paid the money contracted to be paid in pursuance thereof, he shall not have the help of a Court to fetch it back again. You shall not have a right of action when you came into a Court of Justice in this unclean manner to recover it back."

Cases in which money paid on illegal contracts may be recovered.

To this rule, however, there are two exceptions : The first is, *where the illegality is created by some statute, the object of which is to protect one class of men against another*, or where the illegal contract has been extorted from one party by the oppression of the other. In cases of this sort, although the contract is illegal, and although a person belonging to the class *against* whom it is intended to protect others cannot recover money he has paid in pursuance of it, yet a person belonging to the class to be protected may, since the allowing him to do so renders the Act more efficacious. You will see this proposition illustrated by the case of *Smith v. Bromley* (a), which turned on the application of one of the old Bankrupt Acts. That Act, to prevent practices on bankrupts who had not obtained their certificates, and who for the sake of obtaining

(a) 2 Dougl. 696, note.

them were likely to be willing to submit to any terms, however hard, that might be imposed upon them, vacated all securities given by the bankrupt or any one on his behalf, in consideration of the signature of the certificate. A creditor refused to sign the certificate unless a sum of money was paid him by a friend of the bankrupt's, and, the money having been paid, it was held that the person who paid it might recover it back again. In like manner one of the old Lottery Acts forbade, under a penalty, the ensuring of lottery tickets. The plaintiff had paid a sum of money to the lottery office keeper as premiums for the purpose thus forbidden, and was held entitled to recover it back as money received to his use (b). The Acts against usury (now repealed), made the taking money, reward, or promise of reward, by the informer or plaintiff suing for the penalties of usury, in order to compound with any person offending against those laws, very highly penal: the object being to prevent the person so offending from being harassed by vexatious actions and informations. It was, therefore, held, that, where the defendant had in a former action sued the plaintiff for the penalties of usury in a transaction with another person, and the plaintiff had, in order to get rid of that penal action, compounded with the defendant, by paying him a large sum of money, he might

(b) *Jacques v. Golightly*, 2 1 H. Bl. 65.
Bl. 1073; *Jacques v. Withy*,

recover it back from the defendant, the prohibition against compounding such actions being made for the protection of the party sued in them. The Court considered, that, although the plaintiff was guilty of usury, and liable to the penalties for usury, he was not liable to be harassed by actions commenced for the purpose of being compounded. His criminality was collateral to the offence of compounding; his consciousness of his usurious dealings and dread of the consequences laid him at the mercy of the defendant, and enabled the latter to effectuate an act of extortion by procuring the payment of a sum of money: and that, in respect of the criminal offence of compounding, the plaintiff was the person whose situation was taken advantage of against the object of the statute, which, for his protection, made such compounding illegal (c).

Very similar to the case of *Smith v. Bromley*, above cited, is that of *Smith v. Cuffe* (d), where the defendant, who was a creditor of the plaintiff, entered into an agreement with the plaintiff and his other creditors, to accept a composition of 10s. in the pound on the debts due to them from the plaintiff. The defendant would not enter into this agreement except upon the consideration that the plaintiff should give him his promissory note for

(c) *Williams v. Hedley*, 8 East, 378. *Atkinson v. Denby*, 31 L. J. (Ex.) 362; 7 H. & N. 934,

(d) 6 M. & Selw. 160. Ex. Ch.

the remainder of his debt. The note was given, the 10s. in the pound paid, the defendant passed away the note, and the owner compelled the plaintiff to pay it. The Court decided that the plaintiff might recover back from the defendant the amount of the note so paid. In this case it was strongly argued, that, both parties having been guilty of a fraud upon the creditors, the case was within the rule *in pari delicto potior est conditio defendentis*; but Lord *Ellenborough* said, "this is not a case of *par delictum*, but of oppression on one side, and submission on the other; it can never be predicated as *par delictum*, when one holds the rod, and the other bows to it; there was an inequality of situation between these parties—one was creditor, the other debtor, who was driven to comply with the terms which the former chose to enforce. And is there any case, where, money having been obtained extorsively and by oppression, and in fraud of the party's own act as it regards the other creditors, it has been held that it may not be recovered back? On the contrary, I believe it has been uniformly decided, that an action lies."

This case has been approved and acted on in the more recent case of *Horton v. Riley* (e), where the defendant, being a creditor of the plaintiff entered into a similar agreement to that in *Smith v. Cuffe*, with the plaintiff and his other creditors, but at

(e) 11 M. & W. 492. See (C. P.) 1.
Fraser v. Pendlebury, 31 L. J.

the same time agreed with the plaintiff himself privately to give him his promissory note for the remainder of the debt, which note the plaintiff promised to keep in his own hands, but he negotiated the note, and the holder enforced payment from the plaintiff. Under these circumstances, it must be evident, that, if sued by the defendant upon the note, he would have had a good defence against him. Of this defence he was deprived by the defendant's having handed the note over, whereby the plaintiff was compelled to pay the money, and had therefore a right to recover it back from the defendant. "The agreement in this case," said Lord *Abinger*, "makes it a stronger case even than *Smith v. Cuffe*, and I see no reason why we should depart from that decision."

Stakeholder.

The other exception is, that, *when money has been paid in pursuance of an illegal contract, but paid not to the other contracting party, but to a stakeholder, then either party may recover it back again*; for instance, if parties agreed to play at an illegal game, and each deposited his stake in A.'s hands, either might recover it back from A.; for it is obvious, that, in this case, to allow the money to be recovered is to allow the parties a *locus pœnitentiæ*, within which they may repent of their illegal contract, and refrain from completing it at all. Thus it was held, before the recent alterations of the Gaming Acts, and would, as appears by what has been said upon that head of law, be so now, that if

a wager be deposited with a stakeholder, to be paid over on the event of a battle to be fought by the parties laying the wager, and it be demanded from him *before it has been paid over* (*f*), the party demanding may recover it from the stakeholder, although the battle has been fought (*g*), but it did not appear which party had succeeded.

The law on this point has commonly been illustrated in the case of stakeholders, as these cases show; but where the party receiving the money, receives it in pursuance of any agreement between him and the other party, according to which he is to apply it to an illegal purpose, the other may recover it before it is so applied (*h*).

I have now done with the contract itself. I have stated the various points relating to the contract itself, the consideration, and the effect of illegality on either. In the next Lecture I shall speak of the parties to it.

(*f*) *Holland v. Russell*, 32 L. J. (Q. B.) 297. 221; *Hodson v. Terril*, 1 C. & M. 797; *Batty v. Mar-*

(*g*) See *Cotton v. Thurland*, 5 T. R. 405; *Smith v. Bickmore*, 4 Taunt. 474; *Hastelow v. Jackson*, 8 B. & C. 221; *Hodson v. Terril*, 1 C. & M. 797; *Batty v. Mar-*

(*h*) *Bone v. Ekless*, 29 L. J. (Ex.) 438.

telow v. Jackson, 8 B. & C.

LECTURE VIII.

PARTIES TO CONTRACTS.—WHO ARE INCOMPETENT
TO CONTRACT.—INFANTS.—WIVES.

Parties to
contracts.

THE next branch of the subject relates to the *parties to the contract*. Now this, you will at once perceive, involves a double consideration.

First, regarding the *ability* of the parties to the contract to contract at all.

Secondly, regarding their ability to enter into this or that particular sort of contract ; for (as I shall have to explain more at length to you) there *are* persons who are allowed by the law to contract, but are not allowed to contract in the same way as an ordinary individual ; for instance, a corporation may contract *by deed*, but cannot, except in certain cases which I shall presently specify, contract in any other manner. However, although these two considerations are in themselves distinct, yet I think the better and more intelligible plan will be to deal with both of them together, specifying, one by one, those classes of persons regarding whose power to contract the law contains any particular provisions, and pointing out, while treating upon each of them, in what cases they are disabled from entering into

any contract, and in what cases, although allowed to contract, they are obliged to do so in a particular form.

Now, I need hardly tell you that, *prima facie*, any subject of the realm has power to enter into any contract not rendered illegal by the provisions of the statute or common law ; and, therefore, the cases to which I am now to advert are cases of complete or partial *disability* ; cases in which a contract, which would have been good if entered into by an ordinary individual, is, when entered into by some particular individual, invalid, because that individual happens to fall within a class of persons who either do not possess *ability* to contract at all, or do not possess ability to contract in that particular way.

Personal
inability to
contract.

The first of these classes of persons to which I shall advert, is that of *Infants*.

The general principle which regulates this branch of the law is, that until an individual has attained the age of twenty-one, which period the law has selected as that at which a person of average capacity may fairly be supposed to have attained sufficient experience to render his natural faculties fully available in the practical business of the world, it is necessary to shield him from the dangers of becoming a prey to others willing to take an advantage of his inexperience ; and as there are no means of doing this except by placing him under a limited disability to contract, he is accordingly placed under such limited disability. But, inas-

Infants.

Are partially
disabled from
contracting.

much as to place him under a *total* disability might have the effect of preventing him from attaining objects not only not detrimental, but of the utmost advantage to him, he is, in order to avoid this risk, permitted to bind himself to a certain extent, since otherwise he might be unable to obtain food, clothes, or education, though certain to possess at no very distant period the means of amply paying for them all.

May contract
for necessaries.

The general principle therefore is, that an infant may bind himself by a contract for what the law considers *necessaries*, but not by any other contract. We will consider, therefore, what it is that the law comprises under this denomination.

What are
necessaries for
infants.

Now, it is well established by the decisions, that under the denomination *necessaries* fall not only the food, clothes, and lodging necessary to the actual support of life, but likewise means of education suitable to the infant's degree, and all those accommodations, conveniences, and even matters of taste, which the usages of society for the time being render proper and conformable to a person in the rank in which the infant moves. The question *what* is conformable—*what* is, in the legal sense of the word, *necessary*—is, in each case, to be decided by a jury (a); but these are the principles by which the judge ought to direct the jury that their decision should in each particular case be guided. It

(a) *Ryder v. Wombwell*, 37 L. J. (Ex.) 48.

is impossible to understand this subject practically, so as to be able to say with tolerable certainty what would be the decision on this or that particular case, except by a familiarity with similar ones. I will therefore refer you to a number of decided cases, containing, in my judgment, the best illustrations of the matter.

The two cases of *Peters v. Fleming* (b), and *Harrison v. Fane* (c), in one of which the infant was held liable, and in the other not, appear to me to furnish good examples of the distinctions of which I am speaking.

In *Peters v. Fleming*, the plaintiff, who was a jeweller, brought an action of debt against an infant who pleaded his infancy by way of defence; the plaintiff replied that the goods, for the price of which he sued, were *necessaries* suitable to the estate, degree, and condition in life of the infant; on which issue was joined, and the question to be tried was, whether they were or were not so. It turned out that the infant was the eldest son of a member of Parliament, who was, also, a gentleman of fortune, and that the infant was an undergraduate of the University of Cambridge, and resided at the University. The articles supplied were four rings, a gold watch-chain, and a pair of breast-pins. The jury found that these articles were *necessaries*, and a motion was made to set aside

(b) 6 M. & W. 42.

(c) 1 M. & Gr. 550.

the verdict as contrary to evidence. The Court of Exchequer, however, refused to interfere. Baron *Parke* said,—“It is perfectly clear, that, from the earliest time down to the present, the word *necessaries* was not confined to such articles as were necessary to the support of life, but extended to articles fit to maintain the particular person in the state, station, and degree of life in which he is ; and therefore, we must not take the word ‘*necessaries*’ in its unqualified sense, but with the qualification above pointed out. The question, therefore, is, whether there was any evidence to go to the jury that any of these articles were of that description. I think there are two that might fall under that description, namely, the breast-pin and the watch-chain. The former might be a matter either of necessity or of ornament. The usefulness of the other might depend on this, whether the watch was necessary ? If it was, then the chain might become necessary itself. Now, it is impossible that a judge could withdraw from the consideration of a jury whether a watch was necessary for a young man at college, and of the age of eighteen or nineteen, to have. That being so, it is equally, as far as the chain is concerned, a question for the jury. There was therefore evidence to go to the jury. The true rule I take to be this, that all such articles as are *purely* ornamental are not necessary, and are to be rejected, because they cannot be requisite for any one, and for such matters therefore an infant cannot

be made responsible. But if they were not strictly of this description, then the question arises whether they were bought for the necessary use of the party, in order to support himself properly in the degree, state, and station of life in which he moved. If they were, for such articles the infant may be made responsible."

On the other hand, in *Harrison v. Fane* (d), an action was brought by a livery stable-keeper for the hire of horses; the defendant pleaded infancy, and the plaintiff replied that the horses furnished were necessary for the infant, upon which issue was joined. It turned out, on the trial, that the defendant was the younger son of a gentleman who had once been a member of Parliament, and who had a family of five children. The defendant, the infant, kept a horse of his own, and sometimes hunted with his father's hounds. Under these circumstances the judge who tried the cause thought that the horses were not necessities, and directed the jury accordingly; but the jury thought proper, nevertheless, to find their verdict for the plaintiff. The Court, considering it a perverse one, and contrary to law, set it aside, the L. C. J. observing that he would not say that horses could not be necessities under any circumstances, but that no evidence was given that they were so in the present case. With regard to L. C. Justice's remark, I feel no difficulty in putting

a case in which a horse might be considered necessary. Suppose, for instance, the infant were a young man in a genteel station of life, and had been ordered horse exercise by a medical attendant.

Thus, in a case subsequently decided (*e*), soda water, oranges, and jellies, for an infant undergraduate at college, were held, *prima facie*, not to be necessities, though they might have been shown to have been so. "This," said Mr. Baron *Parke*, "is the case of a young man resident in the town, and having from his college everything necessary for a person in *statu pupillari*." Had there been evidence that his medical attendant recommended them, they would undoubtedly have been considered necessities (*f*). The case of *Hands v. Slaney*, (*g*), also well illustrates both these propositions, for in that case it was held that a captain in the army, under age, was liable for a livery, ordered by him for his servant, but not for cockades given to the soldiers of his company. Lord *Kenyon* thought it was proper for a gentleman in the defendant's situation to have a servant, and if proper to have a servant, that servant should have a livery, but the cockades could not be necessities. If the articles supplied to the infant are in their own nature necessities, considering the infant's degree and station, it is immaterial that he had such an

(*e*) *Brooker v. Scott*, 11 M. 5 Q. B. 606.
 & W. 67. (g) 8 T. R. 578; *Coates v.*
 (*f*) *Wharton v. Mackenzie*, *Wilson*, 5 Esp. 152.

allowance paid to him as might have enabled him to pay ready money for them (*h*). Nor is it necessary for a tradesman before supplying an infant with goods, to make inquiries as to the degree in which he is already supplied with goods of the like kind (*i*), although, if the infant is fully and amply supplied, the goods furnished by the tradesman cannot be necessaries, and, therefore, he supplies them at his peril (*k*).

It has always been considered that necessaries for an infant's wife and children are necessaries for himself (*l*), a doctrine, which, together with that of an infant's liability generally, is so fully and clearly explained in the judgment of the Court of Exchequer, in the case of *Chapple v. Cooper* (*m*), that it deserves to be carefully studied. "It seems clear," said Mr. Baron *Alderson*, delivering the judgment of the Court, "that an infant can contract so as to bind himself in those cases where it is necessary for him to have the things for which he contracts; or where the contract is, at the time he makes it, plainly and unequivocally for his benefit. It is with the former class that we are concerned. Things necessary are those without which an individual cannot reasonably exist. In the first place, food,

(*h*) *Burghart v. Hull*, 4 M. & W. 727. 2 W. Bl. 1325.

(*l*) *Turner v. Trisby*, 1 Str.

(*i*) *Brayshaw v. Eaton*, 5 Bing. N. C. 231. 168.

(*m*) 13 M. & W. 252.

(*k*) *Bainbridge v. Pickering*,

raiment lodging, and the like. About these there is no doubt. Again, as the proper cultivation of the mind is as expedient as the support of the body, instruction in art or trade, or intellectual, moral, and religious information may be a necessary also. Again, as man lives in society, the assistance and attendance of others may be a necessary to his well-being. Hence, attendance may be the subject of an infant's contract. Then the classes being established, the subject-matter and extent of the contract may vary according to the state and condition of the infant himself. His clothes may be fine or coarse, according to his rank ; his education may vary according to the station he is to fill ; and the medicines will depend on the illness with which he is afflicted, and the extent of his probable means when of age. So, again, the nature and extent of the attendance will depend on his position in society ; and a servant in livery may be allowed to a rich infant, because such attendance is commonly appropriated to persons in his rank of life. But in all these cases it must first be made out that the class itself is one in which the things furnished are essential to the existence and reasonable advantage and comfort of the infant contractor. Thus, articles of *mere* luxury are always excluded, though luxurious articles of utility are in some cases allowed. So, contracts for charitable assistance to others, though highly to be praised, cannot be allowed to be binding, because they do not relate

to his own personal advantage. In all cases there must be personal advantage from the contract derived to the infant himself. It is manifest, we think, that this principle alone would not be sufficient to decide the present case. For it would be difficult to say that there is any personal advantage necessarily derived to an infant from the mere burial of a deceased person. But there is another consideration which arises out of the circumstances of this case, which may, we think, materially affect the defendant's liability. This is the case of an infant widow, and the burial that of her husband, who has left no property to be administered. Now, the law permits an infant to make a valid contract of marriage; and all necessaries furnished to one with whom he becomes one person by or through the contract of marriage, are, in point of law, necessaries to the infant himself. Thus, a contract for necessaries to an infant's wife and lawful children is used by Lord *Bacon* as one of the illustrations of the maxim '*Persona conjuncta æquiparatur interesse proprio*' (n). 'If a man,' says Lord *Bacon*, 'under the years of twenty-one contract for the nursing of his lawful child, this contract is good, and shall not be avoided by infancy, no more than if he had contracted for his own aliment or erudition.' Now there are many authorities which lay it down that decent Christian burial is a part of a man's own

(n) Bac. Law Maxims, r. 18—Broom's Maxims, 407, 2nd edit.

rights ; and we think it is no great extension of the rule, to say that it may be classed as a personal advantage, and reasonably necessary to him. His property, if he leaves any, is liable to be appropriated by his administrator to the performance of this proper ceremonial. If, then, this be so, the decent Christian burial of his wife and lawful children, who are the persons *conjunctæ* with him, is also a personal advantage, and reasonably necessary to him ; and then the rule of law implies that he may make a binding contract for it. This seems to us to be a proper and legitimate consequence, from the proposition that the law allows an infant to make a valid contract of marriage. If this be correct, then an infant husband or parent may contract for the burial of his wife or lawful children ; and then the question arises, whether an infant widow is in a similar situation. It may be said that she is not, because during the coverture she is incapable of contracting, and, after the death of the husband, the relation of marriage has ceased. But we think this is not so."

"In the case of the husband, the contract will be made after the death of the wife or child, and so after the relation which gives validity to the contract is at an end to some purposes. But if the husband can contract for this, it is because a contract for the burial of those who are *personæ conjunctæ* with him by reason of the marriage, is as a contract for his own personal benefit ; and if that

be so, we do not see why the contract for the burial of the husband should not be the same as a contract by the widow for her own personal benefit. Her coverture is at an end, and so she may contract; and her infancy is, for the above reasons, no defence, if the contract be for her personal benefit."

"It may be observed, that as the ground of our decision arises out of the infant's previous contract of marriage, it will not follow from it that an infant child or more distant relation would be responsible upon a contract for the burial of his parent or relative."

In the last case upon the subject it was held in strict conformity with this reasoning, that as the contract of marriage is one which it is competent for an infant to enter into, a proper marriage settlement upon an infant lady, even of the property of her intended husband, might justly be considered necessary and suitable to her state and condition; and that consequently the preparation of such settlement was beneficial, and a contract for preparing it was binding upon her (o).

There are, however, some species of contracts which the law considers it so imprudent on the part of an infant to enter into, that it will not allow him to bind himself by them under any circumstances. For instance, an infant cannot *trade*, and consequently cannot bind himself by any contract having

An infant
cannot trade.

(o) *Helps v. Clayton*, 34 L. J. (C. P.) 1.

relation to trade. We know, by constant experience, that infants *do* in fact trade, and trade sometimes very extensively. However, there exists a conclusive presumption of law that no infant under the age of twenty-one has discretion enough for that purpose. You will see this laid down in *Whywall v. Champion* (*p*), *Dilk v. Keighley* (*q*). He may, therefore, recover back in an action for money had and received a sum which, while an infant, he had paid towards the purchase of a share in the defendant's trade (*r*), not having actually received any profit or benefit from the business (*s*). If he had obtained such profit, or had derived advantage from the business, so that he could not put the defendant in the same situation in which he would have been had the contract not been made, he cannot recover back the money (*t*). Some singular consequences follow from this general rule; for instance, a bill of exchange is a mercantile contract, deriving, as I had occasion to explain in the last Lecture, its peculiar and distinguishing qualities from the law merchant. An infant, therefore, as *he* cannot be a merchant, is not allowed to bind himself by becoming a party to such an instrument; and thus, although a young man under the age of

An infant cannot bind himself by a bill.

(*p*) Str. 1083.

(*q*) 2 Esp. 480.

(*r*) *Corpe v. Overton*, 10 Bing. 252.

(*s*) *Holmes v. Blagg*, 8

Taunt. 508.

(*t*) *Corpe v. Overton*, *supra*; *Holmes v. Blagg*, *supra*; *Ex parte Taylor*, in *re Burrows*, 25 L. J. (Bptcy.) 35.

twenty-one may bind himself by a contract to pay money for his necessary dress, living, or education, yet, if he accept a bill for the price of these very articles, it will not bind him ; although by accepting the bill, he in fact would rather gain an advantage, inasmuch as he would be entitled to credit during the time the bill had to run (*u*).

Again, he cannot bind himself by stating an account ; although the items of the account be all recoverable against him as for necessaries (*x*). Indeed, in many instances, the statement of an account often requires so very large a share of that kind of knowledge which is derived from actual experience alone, that there are perhaps few transactions for which the young commonly are less prepared ; he cannot bind himself, therefore, by stating an account. For a similar reason an infant is not bound by an agreement to refer a dispute to arbitration (*y*), nor can he render himself liable by borrowing, even to lay out upon necessaries the money borrowed (*z*).

Nor by
stating an
account.

(*u*) *Williams v. Harrison*, W. 256. See *London and N. Carth.* 160 ; *Williamson v. Watts*, 1 Camp. 552 ; *Harrison v. Cotgreave*, 4 C. B. 562 ; 16 L. J. (C. P.) 198. *Western Ry. Co. v. M'Michael, and Birkenhead ditto v. Pilcher*, 20 L. J. (Ex.) 97 ; 5 Ex. 114.

(*x*) *Trueman v. Hurst*, 1 T. R. 40 ; *Ingledeu v. Douglas*, 2 Stark. 36 ; *Oliver v. Woodroffe*, 4 M. & W. 650 ; *Williams v. Moor*, 11 M. & W. 256. (y) *Watson on Awards*, c. 3, s. 1. (z) *Earle v. Peale*, 1 Salk. 386 ; *Probart v. Knouth*, 2 Esp. 472, note.

In *Oliver v. Woodroffe*, just cited, the infant had given a *cognovit* (which, as you are no doubt aware, is an acknowledgment by a defendant that an action brought against him is rightly brought, and that a named sum is due to the plaintiff), and it was admitted that it was given for necessities supplied to the infant. It was argued that, as an action might have been brought against him for the necessities, he ought to be allowed to confess that action in order to save further expense. But the Court of Exchequer, after considering the point, held that the *cognovit* could not be enforced against the infant, because by that means a minor would be made to state an account, which the law will not allow him to do, so as to bind himself. If an action be brought against him, it is for the jury to determine the reasonableness of the demand. Again, the general principle being that an infant shall be bound by no contract which is not beneficial to him (*a*), it is held that he can engage in none in which the performance of the contract is secured by a penalty ; for that it cannot be for his advantage to become subject to a penalty ; and, therefore, though the old books lay it down that he may bind himself by a deed to pay for necessities (*b*), yet it is clearly settled that he cannot do so by a bond containing a penalty (*c*). A variety of other

(*a*) See *Stikeman v. Dawson*, 16 L. J. (Ch.) 205.

(*b*) Com. Dig. Infant, B. 5.

(*c*) *Ayliff v. Archdale*, Cro. Eliz. 920 ; *Corpe v. Overton*, 10 Bing. 252.

examples might be given ; but I think what I have said sufficient to explain the general nature of an infant's liability and exemption from liability.

This rule that an infant shall not be allowed to bind himself by contracts made in trade, although, looking at it with regard to the present state of education and society, it may appear not to be so requisite as once it was, yet looking at it upon general principles, it is capable of being defended by some strong arguments. The consequences of failure in trade are so fatal, not merely to the property, but often to the reputation of the unsuccessful trader—and a failing trader is so often, in his struggles to save himself from utter shipwreck, and to keep up a good appearance in the sight of the world, induced to have recourse to disingenuous and reprehensible expedients—that possibly, upon reflection, it may be thought not unwise to guard young persons up to a certain point against the accidents and temptations of mercantile speculation, and to ensure to them, as far as possible, the advantage of starting fair in life with fortunes unimpaired and characters unblemished. How grievous would be the situation of a young person beginning life at one-and-twenty an uncertificated bankrupt. Against such a chance the law, as it now stands, effectually guards him ; for, as an infant cannot trade, he cannot become bankrupt ;

Reason why
an infant may
not trade.

and it has been decided that a fiat against him is void (*d*).

Actions cannot be maintained on infants' contracts.

Now, therefore, the general rule being that an infant cannot bind himself except for necessities, next comes the question—Suppose he do, in fact, enter into a contract for something not falling under that denomination, what will be the consequence? In the first place, no action can be maintained against him during his infancy upon any such contract, nor afterwards, unless he elect to confirm it; not even although by fraudulently representing himself to be of age he induced the plaintiff to contract with him (*e*). But, in the second place, the contract is not absolutely *void*, but voidable; and therefore when he arrives at the age of twenty-one, he may confirm it, and, if he do so, he will become liable to an action upon it.

I will exemplify this by the case of *Goode v. Harrison* (*f*). A person of the name of Goode entered into a trading partnership with an infant under the age of twenty-one, named Bennion; a third person, named Harrison, supplied them with goods, and after Bennion came of age, he took no

(*d*) *Belton v. Hodges*, 9 28 L. J. (Ch.) 760.

Bing. 365. See *ex parte John West, re W. & J. West*, 22 L. J. (Bptcy.) 71; *Unity Banking Ass. v. King*, 27 L. J. (Bptcy.) 33; *Nelson v. Stocker*,

(*e*) *Bartlett v. Wells*, 31 L. J. (Q. B.) 57; *De Roo v. Foster*, 12 C. B. N. S. 272.

(*f*) 5 B. & Ald. 147; *Unity Banking Ass. v. King*, *supra*.

step to signify to the world that he disclaimed the connection with Goode, but, on the contrary, allowed it to be supposed that he was still in partnership with him. After this, Harrison supplied Goode with more articles, and brought an action against him for the price, jointly with Bennion, as a co-defendant. Bennion set up his infancy, and urged that, as an infant cannot bind himself by a contract made in the course of trade, his agreement, while under age, to become Goode's partner was not binding upon him, and consequently that not being Goode's partner, he was not liable for the articles supplied to him. On the other hand it was urged that, admitting the partnership contracted while he was an infant to be voidable, it was nevertheless in his option, when he arrived at his full age of one-and-twenty, to adopt and confirm it; that by his conduct he had done so; and that consequently he was liable for the goods supplied afterwards. The question was argued, as you may suppose, with great ability, the counsel being Mr. Baron *Parke* and the late Mr. Justice *Little-dale*. The Court decided in favour of the plaintiff. The principle is clearly and strictly laid down in the judgment of Mr. Justice *Bayley*:—"It is clear," says his Lordship, "that an infant may be in partnership. It is true that he is not liable for contracts entered into during his infancy; but still he may be a partner. If he is in point of fact a partner during his infancy, he may, when he comes

of age, elect whether he will continue that partnership or not. If he continue the partnership, he will then be liable as a partner. If he dissolve the partnership, and if when of age he take the proper means to let the world know that the partnership is dissolved, then he will cease to be a partner."

It is easy to apply this mode of reasoning to any other sort of contract (*g*). Thus, if he makes a lease of his land, which is binding if for his benefit, but not otherwise, and after majority accepts rent, and by other acts affirms the contract, this is strong evidence that the lease is beneficial and binding (*h*); or if an infant lessee remains in possession of the house or land demised, and pays rent after majority, he cannot repudiate it afterwards, but it is confirmed from the beginning (*i*). This head of law has been much and elaborately considered in several recent cases, in which the liability of an infant holder of railway shares to pay the calls upon them has been in dispute. The arguments and judgments in these cases (which are cited below) demand a very careful perusal, and will amply repay it in the very full view which they give of the principle now under discussion, and the application

(*g*) *Southerton v. Whitelock*,
1 Str. 690.

(*h*) Shep. Touch. 268; *Ashfield v. Ashfield*, Sir W. Jones, 157.

(*i*) *Ketsey's case*, Cro. Jac. 320; *Holmes v. Blogg*, 8 Taunt. 35. See *ex parte Taylor*, in *re Burrows*, 25 L. J. (Bptcy.) 35.

of it. Assuming, according to the opinion of the Court of Exchequer, that the question of the infant's liability does not depend conjointly upon the Act creating the company, and upon the Companies Clauses Consolidation Act, 8 & 9 Vict, c. 16, but upon the Common Law, it has been repeatedly decided, that, where an infant becomes the holder of shares by his own contract and subscription, he is *prima facie* liable to pay the calls (*k*); he may repudiate that contract and subscription, and if he does so while an infant, although he may on arriving at full age affirm his repudiation, or receive the profits, it is for those who insist upon his liability to make out these facts (*l*). Infants having become shareholders in railway companies, have been held liable to pay calls. "They are purchasers," said the Court of Exchequer in *The London and North Western Railway Company v. M'Michael*, "who have acquired an interest not in a mere chattel, but in a subject of a permanent nature, either by contract with the Company, or by devolution from those who have so contracted, and with an obligation attached to it which they are bound to discharge, and have been thereby placed in a situation analogous to an infant purchaser of real estate, who has taken possession, and thereby become liable to

(*k*) *London and North- don Ry. Co. v. Cazenove*, 10
Western Ry. Co. v. M'Mi- Q. B. 935.
chael, 20 L. J. (Ex.) 97; 5
 Ex. 114. See *Cork and Ban- (l) Newry and Enniskillen*
Ry. Co. v. Coombe, 3 Ex. 565.

all the obligations attached to the estate ; for instance, to pay rent in case of a lease rendering rent, or to pay a fine due on an admission in the case of copyhold, to which an infant had been admitted (*m*), unless they have elected to waive or disagree to the purchase altogether, either during infancy or after full age, at either of which times it is equally competent for an infant so to do." Thus, where there has been no waiver or repudiation, he continues liable to pay the calls ; and where the infant avoids the contract for purchase during minority, he is not liable. If, after full age, the party repudiates a contract made during his infancy, it may be gathered from what has been said, and indeed hardly requires stating, that he must do so within a reasonable time after he comes of age (*n*). However, in order to prevent persons from inconsiderately confirming contracts made by them during infancy, and to obviate the danger of attempts to foist such confirmation on them by false evidence, it is enacted, by 9 Geo. IV., c. 14, s. 5, that no action shall be maintained whereby to charge any person upon any promise made, after full age, to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made, by some *writing*, signed

(*m*) *Evelyn v. Chichester*, 3 Burr. 1717. *Ry. Co. v. Black*, 22 L. J. (Ex.) 94 ; 8 Ex. 181, S. C.

(*n*) *Dublin and Wicklow*

by the party to be charged therewith (*o*). There is some difficulty, in cases like the present, in understanding clearly what is meant by a ratification. It is generally, as was remarked by Lord *Ellenborough*, in *Cohen v. Armstrong* (*p*), more correct to say, that the infant made a new promise after he came of age. To say that he ratified it, is an artificial inference from the fact. It is not a ratification, unless done *animo ratificandi*, whereas it is in general only a new promise to pay. But, whatever difficulty may exist, the law clearly recognises ratification as something distinct from a new promise. Indeed, Lord Tenterden's Act, 9 Geo. IV., c. 14, s. 5, as observed by the Court of Exchequer, "makes a distinction between a new promise and the ratification, after majority, of the old promise made during infancy, in both cases requiring a written instrument signed by the party. The first step, therefore, to take towards a decision of questions on this part of the subject, is, to understand clearly what is meant by a ratification, as distinguished from a new promise. We are of opinion, that any act or declaration which recognises the existence of a promise as binding, is a ratification of it; as in the case of agency, anything which recognises as binding an act done by an agent, or by a party who has acted as agent, is an adoption

(*o*) See *Hartley v. Wharton*, 11 A. & E. 934; *Hunt v. Massey*, 5 B. & Ad. 902; *Hyde v. Johnson*, 2 Bing. N. C. 778; (*p*) 1 M. & Sel. 724.

of it. Any written instrument, signed by the party, which in the case of adults would have amounted to adoption of the act of a party acting as agent, will in the case of an infant who has attained his majority amount to a ratification (*q*).

Persons who
contract with
infants are
bound by
their contract.

Now, then, such being the effect of an infant's contracts with regard to the infant himself, it remains only to say a word or two as to their effect on the other contracting party. And, as to him, the rule is, that *he is bound though the infant is not*; for, to use the words in which the rule is stated in Bacon's Ab., "Infancy," I. 4,—“Infancy is a personal privilege of which no one can take advantage but the infant himself; and, therefore, though the contract of the infant be voidable, yet it shall bind the person of full age; for, being an indulgence which the law allows infants, to secure them from the fraud and imposition of others, it can only be intended for their benefit, and is not to be extended to persons of the years of discretion, who are presumed to act with sufficient caution and security. And, were it otherwise, this privilege, instead of being an advantage to the infant, would in many cases turn greatly to his detriment.” Thus, for instance, in *Holt v. Ward* (*r*), a gentleman of full age had promised to marry a minor. It was decided that she might maintain an action

(*q*) Judgment of the Court, J. (Ex.) 342; 10 Ex. 206.
in *Harris v. Wall*, 1 Ex. 122. (*r*) 2 Str. 937.
See *Mawson v. Blane*, 23 L.

against him for breach of promise, though he could not have done so had she refused to perform her side of the contract. Again (s), an infant was allowed to maintain an action on a contract to purchase a crop, on which no action could have been maintained against him.

I now come to the second class of persons on whose capacity to contract I think it necessary to observe. I mean that of *married women*.

Now a contract by or with a married woman is one of two sorts : it is either a contract which she entered into *before* her marriage, and which continued in existence afterwards ; or it is a contract which she entered into subsequently to her marriage.

Contracts
by married
women.

Now with regard to the former description of contracts, I will dispose of them in a few ———. Upon the marriage, the benefit of, and the liability, the wife's contracts made before marriage in the husband, and continue vested in him the continuance of the marriage (t). If a before they are enforced, and he survive he entitled to the benefit of such contracts, not own right, but as her administrator (u), liable to be sued on them, not in his ind

Contracts
entered into

(s) *Warwick v. Bruce*, 2 M. & Sel. 205. *Milner v. Milnes*, 627 ; Sel. N. P. 344,

(t) *Mitchinson v. Hewson*, 7 T. R. 348 ; Com. Dig. tit. (u) *Betts v. Kimp* & Ad. 273.

"Baron and Feme," E. 3. See

capacity, but as his wife's administrator. Thus, in an action on a promissory note, brought by the administrator of Ann Hart, it was proved that it was made by the defendant and delivered by him to Ann Hart, who was then a *feme sole*, but who afterwards married William Hart (not her administrator) and died intestate in his lifetime. The Court held that the note clearly did not become the property of William Hart, but passed to the plaintiff as her administrator; and that the husband, not having obtained administration to his wife, had no interest in the note (x). If she survive him, her right to the benefit of, and her liability upon, such contract revives, assuming always that nothing has been done to put an end to the contract during the continuance of the marriage (y). With respect to debts due to the wife *dum sola*, the husband, says Lord *Ellenborough*, "is her irrevocable attorney, if I may so say: and if he reduce them into possession during the coverture, they become his debt, but until that is done they remain the debt of the wife; and all the cases agree that in the event of his death, they would survive to her." The Court, therefore, held that the husband alone could not be petitioning creditor upon the bankruptcy of a debtor of his wife, who became such before her marriage. And the Court of Exchequer has, upon

(x) *Hart v. Stephens*, 6 Q. & Sel. 176; *Fitzgerald v. B.* 937. *Fitzgerald*, 8 C. B. 592.

(y) *Rumsey v. George*, 1 M.

the same ground of survivorship in the wife, decided that if the husband become bankrupt, his assignees cannot sue in their own names alone upon a promissory note given to the wife before marriage (z).

During the marriage the husband may, as I have said, sue or be sued upon his wife's contracts, made while she was a single woman ; but if he sue he must join her as a co-plaintiff ; and if he be sued, she must be joined as a co-defendant (a).

Right of
action on such
contracts
during mar-
riage.

Such is shortly the state of the law regarding the effect of marriage on the contracts made by the wife while single. There is one case, indeed, in which the husband may sue upon a contract made with her while single, without joining her as a co-plaintiff. This is where a bill of exchange or promissory note has been given to her ; in which case his suing upon it in his own name is an election to take it to himself and a dissent to his wife's having any interest in it, an election which, as will be seen hereafter, a husband has with respect to his wife's choses in action, and which the peculiar nature of a promissory note enables him to make, by merely suing on it. For the wife could not, after marriage, indorse the note, and it would be nugatory for the husband to indorse to himself. But he may, if he

Where bill of
exchange has
been given to
the wife *dum
solo*.

(z) *Sherrington v. Yates*, 12 M. & W. 855 ; *Dingley v. Robinson*, 26 L. J. (Ex.) 55. & Sel. 180 ; *Milner v. Milnes*, 3 T. R. 627 ; *Pittam v. Foster*, 1 B. & C. 248.

(a) *Rumsey v. George*, 1 M.

pleases, leave it as it is, and then the remedy on it survives to the wife (b).

Contracts entered into by married women during coverture.

Last instance of one Court at Westminster requesting the assistance of another to hear and decide.

Next as to contracts entered into by a married woman subsequently to her marriage. It is a general rule, that a married woman cannot bind herself by any contract made during the coverture: not, as in the case of an infant, from any presumption of incapacity, but because she has no separate existence, her husband and she being, in contemplation of law, but one person. The great case on this subject is *Marshall v. Rutton* (c), which was decided by all the Judges in England except Mr. J. *Buller*, and is one of the last, perhaps the very last instance of the practice which was so common in the early ages of the law, according to which any one of the superior Courts before which a very important point arose, requested the assistance of the Judges of the other two, to hear it discussed, and to assist in deciding it. In this case it was decided that she cannot bind herself by any contract made during her coverture, although she was separated from her husband, and had a separate maintenance; or where she was living in open adultery, although the contract was for goods sold to her, and the vendor knew not of her marriage (d). Her hus-

(b) *Gaters v. Madeley*, 6 M. & W. 423. See *M'Neilage v. Holloway*, 1 B. & Ald. 218; *Howard v. Oakes*, 3 Ex. 136. (c) 8 T. R. 545; *Lewis v. Lee*, 3 B. & C. 291. (d) *Meyer v. Haworth*, 8 A. & E. 467.

band being a foreigner residing abroad, is not a sufficient circumstance to make her liable (*e*) ; nor will his having been a bankrupt who had absconded from his creditors, and was residing abroad when the contract was made, render her liable to be sued upon it (*f*).

In a word, the person who contracts with a married woman, as far as any right in a court of law is concerned, relies upon her bare word ; for she is not recognised there as a person capable of binding herself by any contract whatever, save only in a few cases, which I will now specify.

The first of these is where her husband is civilly dead : for instance, where he is under sentence of transportation. In such a case, to prevent her from contracting, would be to deprive her too of all civil rights, since the husband, being civilly dead, is no longer capable of contracting for her (*g*). This is a very old doctrine, having been first established in the 2nd Hen. IV. In the Year Book of which year we find that Belknap, the Lord High Treasurer, was banished to Gascony till he should obtain the King's favour, and his wife, Lady Belknap, brought an action in the Common Pleas, which seems to have been the first instance of such a proceeding by a married woman ; for it struck

Where the husband is civilly dead, the wife may contract.

Lady Belknap's case.

(*e*) *Stretton v. Busnach*, 1 Bing. N. C. 139.

(*f*) *Williamson v. Dawes*, 9 Bing. 292.

(*g*) *Ex parte Franks*, 7 Bing. 762 ; *Marsh v. Hutchinson*, 2 B. & P. 226.

the lawyers of those days with so much surprise that they commemorated it by a Latin distich, which Lord Coke has thought it worth his while to preserve in the 1st Institute. It is in the old monkish style, and is not only in Hexameter measure, but in rhyme also : the words are

“ Ecce modo mirum, quod foemina fert breve Regis,
Non nominando virum conjunctum robore legis.”

Another case is where the husband is a foreigner belonging to a country at war with Great Britain. In such case, as he cannot lawfully contract or sue in England, it seems to be admitted that his wife may do so as if she were unmarried (*h*).

Wives may
sue by the
custom of the
city of
London.

By the custom of the city of London, a married woman is allowed to be a trader in her individual capacity, and may sue alone in the city courts on contracts made by her in the course of such trade ; but it would seem that, even in this case, if she were to bring an action in the Courts at Westminster, it would be necessary to make her husband a party to it. This subject is learnedly discussed in *Beard v. Webb* (*i*).

Even if a married woman has been divorced *a mensa et thoro*, which, before the stat. 20 & 21 Vict. c. 85, s. 7, legalised the separation of the parties, but left the marriage bond unsevered, the

(*h*) *Barden v. Keverberg*, 2 H. & N. 178.
M. & W. 61; see *De Wahl v. Branne*, 25 L. J. (Ex.) 343 ; 1 (*i*) 2 B. & P. 93.

same rule applied. Now, however, instead of a divorce *a mensa et thoro*, a decree for a judicial separation is pronounced in those cases in which the limited divorce before-mentioned was obtainable, and has the same consequences ; but in addition to these the wife is, while the separation continues, to be considered a *feme sole*, and may contract as such. Upon such contracts her husband is not liable ; unless upon the separation alimony shall have been decreed to her, in which case, if it be not duly paid, he remains liable for necessaries supplied for her use (s. 26). Moreover, a wife deserted by her husband may obtain from the Court for Divorce and Matrimonial Causes, in the Metropolitan District, from a Police Magistrate, or in the country from two Justices, an order to protect any property which, after her desertion, she may acquire by her own industry, or may become possessed of ; and she is during the continuance of the order, and during her desertion, in the like position in regard to property and contracts, suing and being sued, as if she had obtained a decree of judicial separation (s. 21).

Now, so far with regard to a married woman's right to bind herself by contracts. But, with regard to her power of taking advantage of contracts made by other persons with her, the rule is somewhat different ; for it has been decided that, if a contract be made with the wife, on good consideration, during the marriage, the husband may, if he please, take advantage of it, and recover in an

The husband may avail himself of contracts made by his wife during coverture.

action on it, in which action he may join his wife as a co-plaintiff. And if he die, without taking any such step, the right to sue upon it will survive to the wife (*k*). One of the earliest authorities on this subject is *Brashford v. Buckingham* (*l*), where the wife had undertaken to cure a wound for the sum of ten pounds, which the patient was ungrateful enough not to pay; and after she and her husband had recovered judgment in an action of debt, a writ of error was brought in the Exchequer Chamber on the ground that a married woman could not sue. But the Court said, that, being grounded on a promise made to the wife, upon a matter arising upon her skill, and on a performance to be made to the wife, she is the cause of the action, and so the action brought in both their names is well enough, and such action shall survive to the wife. Wherefore the judgment was affirmed. On the same principle, if a bond be made payable to her, she and her husband may sue upon it (*m*). So if a promissory note be made payable to her. Is not the wife, said Lord *Ellenborough*, the meritorious cause of the action; she is the donee of the note, and it is acquired through her, and the note is a thing

So also of bonds and notes made payable to her.

(*k*) So after divorce, *Wells son v. Lucas*, 22 L. J. (Q. B.) 174; 1 E. & B. 659; *Dalton*

(*l*) Cro. Jac. 77, confirmed in error, Id. 205. *v. Midland Counties Ry.*, 22 L. J. (C. P.) 177; 13 C. B.

(*m*) *Day v. Padrone*, 2 M. 474. & Sel. 396, n. (*b*). See *John-*

which of itself imports a consideration (*n*). There is a very curious case of *Richards v. Richards* (*o*), in which a married woman took a note from her own husband and two other persons. And it was held, that, though no one could have sued on it in his lifetime, yet, that, after his death, she might sue the two surviving makers. A case bearing some analogy to the last, and involving the same principle, afterwards came before the Court of Exchequer Chamber. This is the case of *Wills v. Nurse* (*p*), and is so instructive, that, although a little complicated in its facts, it is desirable to be noticed here. In this case, an agreement between a man and his wife and C. of the one part, and D. of the other part, recited that the husband and wife and C. had sued one Lang, and obtained a cognovit from him; that Wills had given a bail bond for him, which was forfeited; whereupon Wills requested the husband and wife and C. to let Lang be at large, and not proceed against the bail, on his guaranteeing the security of Lang's person if the debt were not paid on a certain day, on which day he would render Lang or pay the money. The Court held that the wife was entitled to join, for the wife, they said, was, as to part of the consideration, the meritorious cause of action. The cognovit was given in an action to which she was a party; the promise to forbear was, indeed, in point

(*n*) *Philliskirk v. Plucknoell*,
2 M. & Sel. 393.

(*o*) 2 B. & Ad. 447.

(*p*) 1 A. & E. 65.

of law, that of the husband only, but it was made with reference to a subject-matter in which the wife was interested. The defendant's agreement is in fact made with the husband and wife; the interest of the wife formed a substratum, upon which a right to join in the action was properly founded. The decision in *Richards v. Richards* is approved of in *Gaters v. Madeley* (q), which is, I believe, the last case on the subject. In that case a promissory note was given to a married woman during the coverture. She survived her husband, and having afterwards herself died before the note was paid, it was held that her executor was entitled to maintain an action upon it. The rule is very clearly laid down in the judgment of Baron Parke. "This," said his Lordship, "is an action on a promissory note—an instrument on which no one can sue unless he was originally party to it, or has become entitled to it under one who was. A promissory note is not a personal chattel in possession, but is a chose in action of a peculiar nature. It has, indeed, been made by statute assignable and transferable according to the custom of merchants, like a bill of exchange. Still it is a chose in action, and nothing more. When a chose in action, such as a bond or note, is given to a *feme covert*, the husband may elect to let his wife have the benefit of it; or, if he thinks proper, he may take it himself: and if

(q) 6 M. & W. 423. See W. 97; *Guyard v. Sutton*, 3 Bendix v. Wakeman, 12 M. & C. B. 153.

in this case the husband had in his lifetime brought an action upon this note in his own name, that would have amounted to an election to take it himself, and to an expression of dissent on his part to his wife's having any interest in it. On the other hand, he may, if he pleases, leave it as it is; and in that case, the remedy on it survives to the wife: or he may adopt another course, and join her name with his own; and in that case, if he should die after judgment, the wife would be entitled to the benefit of the note, as the judgment would survive to her."

Here, you see, all the possible cases are put, and the consequence of each pointed out, which makes this judgment a very useful one for the purpose of practical reference.

Though it is settled law that a promissory note given to the wife during coverture is a chose in action, and not a personal chattel vested in the husband, and that upon his death the right to sue on it survives to the widow unless the husband has reduced it into possession, it is still a point of nicety and difficulty to determine what is a reducing into possession by the husband, such as to deprive the wife of her subsequent remedy. In the recent case of *Hart v. Stephens* (r), where the administrator of a deceased widow sued on a note giving her *dum sola*; the Court held that the husband of the

What is
sufficient
reduction into
possession.

(r) 6 Q. B. 937.

deceased, by receiving interest on the note during the life of the wife, had not reduced it into possession ; and it seems to have been assumed that receiving money on it, or bringing an action for it, are alone sufficient reductions into possession—a doctrine apparently sanctioned by that of Lord *Kenyon*, C. J., in *Milner v. Milnes* (s), and by Lord *Hardwicke* in *Garforth v. Bradley* (t), who puts it on the ground of dissent to the interest remaining in the wife thereby evidenced on the part of the husband. In the still later case of *Scarpellini v. Atcheson* (u), a case which presents some noticeable features, the plaintiff was a widow, and the payee of a promissory note made to her during coverture by the defendant. The husband caused the wife, as the plea stated, “in his marital right,” to endorse to F., who after his death delivered it to the wife, who then brought this action upon it. The Court embodied in the judgment the doctrine we have just stated, and held that the facts as stated did not amount to a reduction into possession by the husband.

Having thus disposed of the consideration, arising on contracts made with or by infants and married women, I will postpone the conclusion of this branch of the subject till the next Lecture.

(s) 3 T. R. 627.

Hamilton v. Mills, 29 Beav.

(t) 2 Ves. 675 ; *Michelmores* 193.

v. Mudge, 29 L. J. (Ch.) 609 ;

(u) 7 Q. B. 864.

LECTURE IX.

PARTIES TO CONTRACTS.—INSANE PERSONS.—INTOXICATED PERSONS.—ALIENS.—CORPORATIONS.—PUBLIC COMPANIES.—THE MODE IN WHICH COMPETENT PERSONS CONTRACT.—AGENTS.—PARTNERS.

PURSUING the inquiry upon which I entered in the last Lecture with regard to the competency of the parties to *Contracts*, and having disposed of the cases of *Infancy* and *Coverture*, the next in order is that of persons of *non-sane* mind, whose disability arises, not, as in the two former cases, from a positive rule of *law*, but from the very nature of their disorder itself. Insane
Persons.

In the earliest ages of our law the rule on this subject appears to have been, that a person deprived of the use of that reason which is the *instrument*, if I may so say, with which men contract, shall not be bound, to his own injury, by contracts made while in such a situation. Thus, in Fitzherbert's *Natura Brevium*, 202, it is laid down, that a person who had enfeoffed another of his land while *non compos* might, on recovering his intellect, avoid the feoffment.

Where fair
contracts with
a lunatic are
held valid.

Subsequently, opinions seem not to have been very well settled (a). But it is now clearly held that the lunacy of one of the contracting parties may be shown by himself if sued upon a contract entered into while he was in that condition. However, it would not be for the lunatic's own benefit to prohibit him *absolutely* from binding himself by any contract whatever. Such a prohibition might prevent him from obtaining credit for the ordinary necessities of life; and there are many modern cases in which contracts evidently of a fair and reasonable description entered into with a lunatic have been held binding on him, and have been enforced. In the case of *Baxter v. Earl of Portsmouth* (b), an action was brought against the Earl of Portsmouth for the hire of several carriages. It was proved that the carriages were suitable to his rank and fortune, and that the price charged for them was a fair and reasonable one; but on the other hand it appeared that an inquisition had issued out of Chancery under which the Earl was found to have been insane for a period long anterior to the time at which the carriages in question were supplied to him. The L. C. J. *Abbott*, before whom the case was tried, directed the jury, that, as the articles hired were suitable to the station and fortune of the defendant, and as the plaintiffs, at the time of making the contract, had no reason to

(a) 2 Bla. Com. 291; *Yates v. Silk*, 3 Camp. 126.
v. *Boen*, Stra. 1104; *Faulder* (b) 5 B. & C. 170.

suppose him of unsound mind, and could not be charged with practising any imposition upon him, they were entitled to recover ; and the jury accordingly found a verdict for the plaintiffs. Mr. (afterwards Lord) *Brougham* moved in the next term to set it aside, but the Court supported the direction of the Lord Chief Justice.

In a subsequent case of *Brown v. Jodrell* (c), the lunatic was the chairman of a society called the *Athenaion*, and he had concurred in ordering work and goods to be supplied to them ; for these Lord *Tenterden* held that he might be sued by the person who had supplied them. From these decisions it is plain that a lunatic's contracts are binding in many instances ; and some treatises suggest that he stands on the same footing with an infant, and is liable only for necessaries. But this is, I think, not quite so ; nor would it be reasonable that it should be so ; for, where a lunatic is permitted to go about and appear to the world as a person of sane mind, it would be very hard indeed to prevent persons who had supplied him with goods under that impression at a fair price, from recovering because the articles were not necessaries. And, in the case I have just cited, of *Brown v. Jodrell*, an infant could not, I think, have been held liable for goods supplied to the *Athenaion*. One of the latest cases in which the subject has been canvassed, is that of

(c) M. & M. 105 ; 3 Car. & P. 679. v. *Kirkcull*, 8 Car. & P. 679. P. 30, S. C. See also *Dane*

Tarbuck v. Bispham (d), in which one of the questions was, whether a lunatic laboured under the same incapacity to bind himself by stating an account as I have already shown you that an infant does. The case went off upon a different point, but the Court said, that, had it become material, they would have granted a rule for the purpose of considering it.

This point was again discussed in the case of *Clarke and Another v. Medcalf and Others*, argued in the Court of Queen's Bench, in Hilary Term, 1841, and in which the judgment was given in the following Trinity Term, but is not reported. It however threw no new light whatever on the subject, and was decided in favour of the plaintiffs, who were London agents of the defendants, who were country attornies; the action was for work done and money paid as such agents, and on an account stated. One of the defendants pleaded insanity. But as there had been an executed contract, and for legitimate consideration, without notice of insanity, or any pretence of fraud by the plaintiffs, the Court adjudged for the plaintiffs, without entering into the question raised by the count on the account stated.

General
conclusion
from the cases.

It seems clear that a lunatic is liable upon an executed contract for articles suitable to his degree, furnished by a person who did not know of his

lunacy, and practised no imposition upon him. Where A. advanced money on mortgage to B., a lunatic, but did not know B.'s state, and took no advantage of him, he was held entitled to a decree of foreclosure (e). It seems equally clear that he is not liable when the other contracting party has taken advantage of his lunacy: indeed, that was the decision in *Levy v. Baker*, reported in a note to *Brown v. Jodrell* (f).

The above cases and reasonings still deserve great consideration; but since the publication of this book the law upon the subject has been reviewed by the Court of Exchequer in the case of *Molton v. Camroux* (g). This was an action for money had and received, brought by the administrator of an intestate, to recover from an annuity society the price paid by the intestate for annuities granted by the society. The ground was, that the intestate was not of sound mind when he paid the money. The elaborate judgment delivered by *Pollock*, C. B., will amply repay an attentive perusal. "As far as we are aware," the Court said, "this is the first case in which it has been broadly contended that the executed contracts of a lunatic must be dealt with as absolutely void, however entered into, and although perfectly fair and *bonâ fide*, reasonable, and without notice on the part of those who have dealt with the lunatic;" and the Court refused to

(e) *Campbell v. Hooper*, 24
L. J. Ch. 644.

(f) M. & M. 106, n.
(g) 2 Ex. 487.

allow the money to be recovered back. The case was carried by a writ of error into the Court of Exchequer Chamber (*h*), and that Court laid down, that when the lunatic's state of mind was unknown to the other contracting party, and no advantage was taken of him, and the contract was not merely executory, but executed in the whole or in part, and the parties cannot be restored to their original position, the contract is not void on account of lunacy. A subsequent case of *Beavan v. M'Donnell* (*i*) differed in some degree from the one last cited. It was brought by the lunatic to recover a deposit paid on a contract for the purchase of real estate, the title of which he was to accept unless he objected within a specified time. It was admitted upon the pleadings that the lunatic was of unsound mind, and therefore incapable of contracting, or of understanding the meaning of a contract, or of managing his affairs, and that the contract was of no use or benefit to him, but that his state was unknown to the defendant. The Court said that the contract was entered into by the defendant fairly and in good faith, and without knowledge of the lunacy; and being a transaction completely executed, so far as the deposit is concerned, the defendant has done all he ought to do to make it his

(*h*) *Molton v. Camroux*, 4 Ex. 309, S. C. See 23 L. J. Ex. 17; *Campbell v. Hooper*, (Ex.) 326; 10 Ex. 184; *Moss v. Tribe*, 3 Fost. & Finl. 9. 24 L. J. (Ch.) 644.

(*i*) 23 L. J. (Ex.) 94; 9

own. The plaintiff has had all he bargained for—the power of buying an estate, and a title established in a given time, on payment of the residue of the purchase-money. The Court thought the case came within the principle upon which *Molton v. Camroux* was decided, and that it made no difference that it was admitted that the plaintiff was incapable of understanding the meaning of contracts; whereas in the former case it was not necessary to be inferred that he was incapable of knowing the nature of his acts. As a lunatic is liable upon such contracts entered into by himself, so he is liable for necessities furnished to his wife (*k*), he having become lunatic since the marriage; for, by contracting the relation of marriage, a husband takes on himself the duty of supplying his wife with necessities; and if he does not perform that duty, either through his own fault or in consequence of a misfortune, such as lunacy, the wife has by reason of that relation an authority to procure them herself, and the husband is responsible for what is so supplied. But it would seem to be the better opinion that an executory contract entered into by a lunatic of non-sane mind at the time he entered into it, cannot be enforced against him; *sed quære*.

As the law regarding the contracts of lunatics has experienced some alteration, so also has the law Contracts by persons intoxicated.

(*k*) *Read v. Legard*, 6 Ex. 636.

Where the
intoxication
was the result
of stratagem.

Where
intoxication
was caused by
the party
himself.

regarding contracts entered into by the class of persons whom I shall next specify,—I mean persons deprived of the use of their ordinary understanding by intoxication. It has been always admitted that if one man, by contrivance and stratagem, reduced another to a state of inebriety, and induced him, while in that state, to enter into a contract, it would be void upon the ordinary ground of fraud ; for the liquor would be in such case an instrument used by the one party to assist him in his plot against the other (*l*). But it has been supposed that, where the drunkenness of the contracting party was occasioned, not by the fraud of the contractee, but by his own folly, he could not in such a case set it up as a defence ; since, by doing so, he would take advantage of his own wrong. You will see this view taken in *Coke Litt.* 247 a, and even so late as *Cory v. Cory* (*m*). There are, however, several late cases, in which it seems to have been treated as erroneous. In *Pitt v. Smith* (*n*), issue had been joined upon the question whether there was an agreement between the plaintiff and defendant for the sale of an estate. It was proved that in fact there was an *agreement* signed, but that one of the parties when he signed it was intoxicated : Lord *Ellenborough* said :—

“ There was no agreement between the parties, if

(*l*) *Gregory v. Fraser*, 3
Camp. 454 ; *Brandon v. Old*,
3 Car. & P. 440.

(*m*) 1 Ves. 19.
(*n*) 3 Camp. 33.

the defendant was intoxicated, in the manner supposed, when he signed this paper. He had not *an agreeing mind*. Intoxication is good evidence upon a plea of *non est factum* to a deed, of *non concessit* to a grant, or *non assumpsit* to a promise ;” and he directed a nonsuit, which the full Court afterwards refused to set aside. In *Fenton v. Holloway* (o) Lord *Ellenborough* again ruled in the same manner (p). It may be considered as now settled, that intoxication avoids a contract when it is so complete as to prevent a man from knowing what he is about: in that state he is, in common parlance, “not himself,” nor are his acts his own. “It is just the same,” said Mr. Baron *Alderson* (q) in an action on a bill by indorsee against indorser (who pleaded drunkenness):—“it is just the same as if the defendant had written his name upon the bill in his sleep, in a state of somnambulism.” In that case the law was thus explained by the learned judges:—

1. As regards the state of the drunken man, where, said Mr. Baron *Parke*, he enters into the contract in “such a state of drunkenness as not to know what he is doing, and particularly when it appears that this was known to the other party, the contract is void altogether. A person who takes an obligation from another under such circum-

(o) 1 Stark. 126.

worth, 18 Ves. 12.

(p) See *Sentance v. Poole*,
3 Car. & P. 1; *Cooke v. Clay-*

(q) *Gore v. Gibson*, 13 M.
& W. 623.

stances is guilty of actual fraud." It can scarcely be that the other party can be ignorant of the complete drunkenness of the person he contracts with personally. But many cases might arise where the party suing was neither present nor cognizant of the state in which the defendant signed or authorised the contract. It seems that a question would there arise as to the consideration.

2. If the consideration were for necessities, Mr. Baron *Alderson* said, that a party, "even in a state of complete drunkenness, may be liable in cases where the contract is necessary for his preservation, as in the case of a supply of actual necessities ; so also where he keeps the goods when he is sober ; although I much doubt whether, if he repudiated the contract when sober, any action could be maintained on it."

The Lord Chief Baron also said, "So a tradesman who supplies a drunken man with necessities may recover the price of them, if the party keeps them when he becomes sober ; although a count for goods bargained and sold would fail." The distinction is thus well shown. To support a count for goods sold and delivered, proof of acceptance as well as delivery is requisite, and if there had been acceptance, the plea of drunkenness would not avail ; the keeping of the goods would be proof of acceptance, and the sober assent thus evidenced would ratify the drunken contract. But into the support of a count for goods bargained and sold delivery

does not enter, as long as the contract was complete at the time ; and the plea of intoxication, if sustained, would be a complete defence, for there could have been no acceptance to waive it.

I have now to direct your attention to aliens. Aliens.
 And we again subdivide this class into two minor ones, of alien friends, and alien enemies. With regard to *alien friends*, they have a right to con- Alien friends.
 tract with the subjects of this country, and may sue on such contracts in the Courts of this country (*r*), whether the contract was made in England or abroad ; with this distinction, that, if it was made in England, it is expounded according to the law of England ; if abroad, according to the law of the Rules whereby
aliens may
sue in English
Courts.
 country where it was made : but, whether it was made abroad or in England, the person who sues on it here must take the remedy here as he finds it, although, perhaps, abroad there might have been a more advantageous one. Thus, for instance, according to the law of England, if a bill of exchange be payable to A. or order, A.'s indorsement in blank, that is, his simply writing his name on the back, is sufficient to transfer the property in it to any one to whom he may think fit to hand it ; whereas, according to the law of France, a special indorsement—that is an indorsement naming the transferee—is necessary for the same purpose. Now if an action be brought in the Queen's Bench here by the indorsee of

(*r*) Bac. Abr. Aliens, D. ; Com. Dig. Alien, C. 5.

an English bill, he will recover on showing an indorsement in blank, whereas, if the action were brought by the indorsee of a French bill, he would be obliged to show a special indorsement. And the reason of this is, that the law of the country where a contract is made being by implication incorporated into the contract, it is considered to be part of the contract arising on such a bill made in England, that it shall be transferable by an indorsement in blank ; and part of the contract arising on a French bill, that it shall be transferable only by a special indorsement (*s*). Again, to an action on a bill of exchange, the French period of limitation is *five* years, ours is *six* ; now, if an action be brought here on a French bill, the Courts here will not adopt the French period of limitation, but our own, and so the payee may recover here at any time within six years, though in France, where the bill was made, he must have brought his action within *five* ; the reason for which is, that the period of limitation within which a remedy is to be pursued is part and parcel of the remedy itself, and, though a *contract* is interpreted by the law of the country where it is made, the *remedy* must be pursued

(*s*) *Trimbey v. Vignier*, 1 Bing. N. C. 151. See *Rothschild v. Currie*, 1 Q. B. 43 ; *Gibbs v. Fremont*, 22 L. J. (Ex.) 302 ; 9 Ex. 25 ; *Allen v. Kemble*, 6 Moo. P. C. 314 ; *Thompson v. Bell*, 23 L. J. (Q. B.) 159 ; 3 E. 236. See *Brook v. Brook*, 27 L. J. (Ch.) 401 ; *Connelly v. Connelly*, 7 Moo. P. C. 438.

as it exists in the country where the suit is brought (*t*).

I have rather digressed, for the purpose of pointing out these two rules to you. They are two of the most celebrated principles of our law, and there is scarcely any question arising on a foreign contract which they will not solve. You will see them carried out and explained in *British Linen Company v. Drummond* (*u*), *De la Vega v. Vianna* (*x*).

So far with regard to contracts made with alien friends; now with regard to *alien enemies*, *i. e.*, aliens whose government is at war with this country. All contracts made with them are wholly void (*y*). Indeed in one case it was decided, that, if the contract was made during war, it does not become capable of being enforced even on the return of peace; although, if a contract be made with an alien friend, and a war afterwards breaks out between his country and this, the effect is to suspend his right to sue upon the contract until the return of peace, not wholly to disqualify him from suing (*z*).

Contracts with
alien enemies.

(*t*) *Huber v. Steiner*, 2 N. C. 202; *Cocks v. Purday*, 5 C. B. 860; *Leroux v. Brown*, 22 L. J. (C. P.) 1; *Ruckmaboys v. Mottichund*, 8 Moo. P. C. 4. T. R. 23; *De Wahl v. Braune*, 25 L. J. (Ex.) 343; 1 H. & N. 178; *Willison v. Patteson*, 7 Taunt. 439; *Esposito v. Bowden*, 27 L. J. (Q. B.) 17; 7 E. & B. 763.

(*u*) 10 B. & C. 903.

(*x*) 1 B. & Ad. 284.

(*y*) *Brandon v. Nesbitt*, 6

(*z*) *Flindt v. Waters*, 15 East, 260; *Alcenius v. Nygrin*, 24 L. J. (Q. B.) 19.

It seems sufficiently connected with the subject of this work to add, that, by the Common Law, aliens may acquire and possess within this realm, by gift, trade, or other means, any goods personal whatever, as well as an Englishman (*a*). By the Act to amend the laws relating to aliens, 7 & 8 Vict. c. 66, ss. 4 & 5, every alien subject of a friendly state may take and hold, by purchase, gift, bequest, representation, or otherwise, every species of personal property, except chattels real, with the same rights, remedies, and capacities, as if he were a natural born subject of the United Kingdom. And every such alien residing here may, by grant, lease, demise, assignment, representation, or otherwise, take and hold any lands, houses, or other tenements, for the purpose of residence or of occupation, or for the purpose of business, trade, or manufacture, for any term not exceeding twenty-one years (*b*).

The Secretary of State, moreover, may, if he sees fit, grant to any alien by certificate all or any of the rights and capacities of a natural born subject, except that of being a member of the Privy Council or of either House of Parliament ; 7 & 8 Vict. c. 66, s. 8.

Outlaws and felons cannot enforce contracts.

Another class of persons who are disabled from enforcing contracts are outlaws, and persons under

(*a*) *Calvin's case*, 7 Co. 3 C. B. 97 ; *Jefferys v. Boosey*, 4 H. L. C. 815 ; *Farina v.* Rep. 1.

(*b*) See *Beard v. Egerton*, *Silverlock*, 24 L. J. (Ch.) 632.

sentence for felony (c). They are, however, liable upon the contracts made by them while in that situation, though incapable of taking advantage of them (d). This disability is removed by pardon; and when the attainder or outlawry is removed, the party may contract and sue as before (e).

There is one other class, I was about to say of individuals, but that would have been incorrect (for, Corporations aggregate. although *persons* in the eye of the law, they are not individuals in common parlance,) regarding whose power of contracting I have a few words to say,—I mean *corporations aggregate*. A corporation aggregate consists, as you know, of a number of individuals united in such a manner that they and their successors constitute but one person in law. Thus, the mayor, aldermen, and burgesses of a borough are a corporation, and as such have an existence distinct from that of the individual mayor, and of the individuals enjoying the franchise, of burgess, or post of alderman. But then, this corporate existence being an ideal one, and the creature of the law, it is obviously impossible that the corporation can contract in the same way as an ordinary person. Accordingly the law, the creature of which, as I have Corporations contract by seal. said, it is, has provided for it a mode of contracting, namely by its common seal, which, being affixed to the contract, authenticates it, and makes it the

(c) *Bullock v. Dodds*, 2 B. Foster, C. C. 61.
& A. 258.

(e) Bac. Abr. "Outlawry,"

(d) *Ramsey v. Macdonald*, H.

deed of the corporation ; and, as a general rule, that is the only way in which a corporation can contract (*f*). A few instances will show the force and the application of this important rule. Thus, in *The Mayor of Ludlow v. Charlton* (*g*), the defendant had laid out a sum of money in pulling down and altering an inn and doing other work, at the request and for the convenience of the corporation, confiding in their promise to pay him that sum for such work ; but though he laid out more than that sum, he was unable to charge the corporation with it, from having neglected the very obvious and easy mode of binding the corporation by deed, as the law prescribes. Even an entry by the corporation in their own books of a minute of this agreement, was not admitted to bind them. In *Arnold v. The Mayor of Poole* (*h*), the plaintiff had performed the duties of attorney to the corporation of that place, which had incurred a large debt to him ; but having only been appointed by the mayor and council, and not under the seal of the borough, he could not recover his costs, although the council of the borough had passed a resolution directing the business to be done by him, and knew of its progress. In *Paine v. The Guardians of the Poor of the Strand Union* (*i*), the guardians, who are a corporation by

(*f*) Com. Dig. Franchises, F. 13.

Queen v. Mayor, &c. of Stamford, 6 Q. B. 433.

(*g*) 6 M. & W. 815.

(*i*) 8 Q. B. 326.

(*h*) 4 M. & G. 860. See

statute, had ordered the plaintiff, a surveyor, to make a survey and a map of the rateable property in a parish which was part of the union, but as the plaintiff had not insisted upon having his retainer under seal, he was unable to recover for the survey or the map.

This general rule, however, has from the earliest traceable periods been subject to exceptions, the decisions as to which furnish the principle on which they have been established, and are instances illustrating its application, but are not to be taken as so prescribing in terms the exact limit, that a merely circumstantial difference excludes from the exception. This principle appears to be convenience, amounting almost to necessity. Hence, the retainer by parol of an inferior servant, authorising another to drive away cattle damage feasant, to make a distress or the like, the doing of acts very frequently recurring, or too insignificant to be worth the trouble of affixing the common seal, are established exceptions. In such cases the head of the corporation has from the earliest time been considered as delegated by the rest to act for them (*k*). Much illustration as to these acts is afforded by the case of *Smith v. Cartwright*, decided in the Exchequer Chamber (*l*). It was an action by one of the coal-meters of King's Lynn, for disturbance in his office of coal-meter, in the exercise of which he claimed

(*k*) *Ludlow v. Charlton*, *supra*. Ex. 927, S. C.

(*l*) 20 L. J. (Ex.) 401 ; 6

the right to weigh coals brought into the port, and to take a certain fee for weighing them ; and it became a material question whether he was duly appointed meter or not. He had not been appointed under seal. The Court held, that, as the right he claimed was to discharge certain duties in regard to the property of third persons altogether against their will, and to demand a fee for so doing, this right must be by reason of his having an office, and not being a mere servant of the corporation, and consequently his appointment must, in order to be valid, be under the seal of the corporation. Had this not been so, but if the corporation had merely claimed a right to measure by persons appointed by themselves, such persons would be merely servants, and might well be appointed without seal. You will also see an enumeration of these acts in Com. Dig. Franchises, F. 13 (*m*). They are treated by the Court of Common Pleas, in the great case of *The Fishmongers' Company v. Robertson* (*n*), as so well known as to require no enumeration in the judgment of the Court. They are apparently as ancient as the doctrine to which they are commonly stated to be exceptions. They do not depend upon any one principle, other than that convenience, amounting almost to necessity, which belongs to them in their very nature, and under which they are ranked by the Court of Queen's Bench in

(*m*) See Bro. Abr. Corp. K.; 47.
and in *Horn v. Ivy*, 1 Vent. (*n*) 5 M. & Gr. 192.

Church v. Imperial Gas Light Company (o). There is, however, a distinction between matters which do and matters which do not affect any interest of the corporation. The former must be authorised by the corporate seal. Thus, they must appoint a bailiff by deed for entering upon lands for condition broken, in order to revest their estate ; but they need not do so where the bailiff is only to distrain for rent (p). To this rule also, the convenience of the world has occasioned some other exceptions ; the principal of which is, that, when a corporation has been created for mercantile purposes, it is allowed to enter without seal into certain contracts,—for instance, bills of exchange (q)—which are usually entered into without seal by commercial men. In the case of *Church v. The Imperial Gas Light Company* (r) the defendants were empowered, by the Act incorporating them, to make gas, and to sell and dispose of it in such manner as they should think proper, with full power to supply and light with gas the shops, houses, streets, &c., in the places mentioned. The statute further enacted that the directors should have the custody

(o) 6 A. & E. 846.

(p) *Smith v. Birmingham Gas Co.*, 1 A. & E. 526 ; *Parol v. Moor*, Plow. 91 ; *Jenkins*, 3rd Cent. case, 68. See *Hall v. Mayor, &c. of Swansea*, 5 Q. B. 526.(q) *Broughton v. Manchester Water Works*, 3 B. & A. 1.(r) *Church v. Imperial Gas Light Co.*, 6 A. & E. 846 ; *R. v. Bigg*, 3 P. Wms. 419 ; *Beverley v. Lincoln Gas Co.*, 6 A. & E. 829 ; *Clarke v. The Guardians of the Cuckfield Union*, 21 L. J. (Q. B.) 349 ; *Nicholson v. Bradford Union*, 35 L. J. (Q. B.) 176.

of the common seal, with full power to use it for the affairs and concerns of the company, and should have power to direct and transact the affairs and business of the company, as well in laying out and disposing of money for the purposes of the same, as in contracting for and purchasing lands and tenements, materials, goods and chattels for the use of the company, &c., and selling and disposing of all lands, &c., and all articles produced as aforesaid. The defendants entered into a simple contract with the plaintiff, to supply him with gas at a certain rate, and the Court held that they had power to enter into this contract, and to sue in *assumpsit* for the price of the gas supplied. "The general rule of law," said the Court in delivering its judgment, "is, that a corporation contracts under its common seal ; as a general rule it is only in that way that a corporation can express its will, or do any act. Whenever to hold the rule applicable would occasion a great inconvenience or tend to defeat the very object for which the corporation was created, the exception has prevailed. On the same principle stands the power of accepting bills of exchange and issuing promissory notes by companies incorporated for the purposes of trade, with the rights and liabilities consequent thereon. We must understand this company to have been incorporated for the purpose of supplying individuals willing to contract with them for gas-light. Such contracts are of almost daily occurrence, and to hold that for every one of them, of the same or less amount, it

was necessary to affix the common seal, would be so seriously to impede the corporation in fulfilling the very purpose for which it was created, that we think we are bound to hold the case fairly brought within the principle of the established exceptions."

Upon similar reasoning where the Australian Mail Steam Navigation Company, (which was constituted a trading corporation by charter for the purpose of maintaining a communication by steam and other vessels for carrying passengers, &c., between Great Britain and Australia), in the performance and for the more effectual prosecution of the objects of their charter, and by a resolution of the directors duly entered into as required by the charter, made a parol agreement with the plaintiff, that in consideration of his going to Sydney to bring home one of their ships which was supposed to be unseaworthy and uninsurable, they would pay his passage out to Sydney and allow him a remuneration for his said services; the Court of Queen's Bench decided that this contract being entered into by the company and performed by the plaintiff for the express purpose of preserving the ship and maintaining the communication and carriage of passengers, &c., between Great Britain and Australia, the company were liable to pay him notwithstanding that the contract was not under seal (s).

(s) *Henderson v. The Australian R. M. Steam Nav. Co.*, 24 L. J. (Q. B.) 322; 5 E. & B. 409.

In another case in which the same company were the plaintiffs, and in which they had bought by parol contract of the defendants a quantity of ale for the use of the passengers on board their steam vessel, and paid the defendants for the same, but the ale proved unfit for use ; the Court of Exchequer held, that the contract, although not under seal, yet being executed, the defendants were liable to the plaintiffs in damages (*t*).

But unless the nature of the business for which the corporation was created, necessarily implies the existence of these powers of contracting otherwise than by deed, it will not have them. Thus it has been held (*u*) that when the East India Company granted a retiring pension to a military officer for services performed to them in the East Indies, but did not grant it under their common seal, the grant did not fall within the reason or principle of the exception, but must be governed by the general rule of law, that a corporation cannot be sued upon a contract, unless under seal. It is, indeed, obvious that the grant of this pension could have no connexion whatever with the condition or powers of the company as a trading community, and consequently that it is not within the exception which has been established as to contracts entered into by

(*t*) *The Australian R. M. Steam Nav. Co. v. Marzetti*, 24 L. J. (Ex.) 273 ; 11 Ex. 228 ; *Reuter v. Electric Telegraph Co.*, 26 L. J. (Q. B.) 46 ; 6 E. & B. 341.
 (*u*) *Gibson v. East India Co.*, 5 Bing. N. C. 262.

corporations instituted for the purposes of trade in matters relating to their trade, or within that respecting matters of daily occurrence and slight importance, which have been alluded to. And where the Governor and Company of Copper Miners (*x*) entered into a parol contract with a person to supply him with a large quantity of iron bars, it was held, that, as there was no evidence that the contract proved was in any way auxiliary to the trade in copper, it must be held not a contract entered into for the purpose of carrying on the trading object for which the plaintiffs were incorporated, and did not bind them ; and consequently, as there was no consideration for the defendant's promise, that he was not bound to perform it. In like manner, where the London Dock Company, a corporation constituted for the purpose of carrying on a particular trade, entered into a contract for the cleansing and removing the filth and dirt accumulating in their docks and basins ; the Court held that such a contract ought to have been under the corporation seal, as it was not a contract of a mercantile nature ; nor was it with a customer of the Company, nor was it of a character which created an impossibility that it should be under seal (*y*). But where a trading company is created by charter,

(*x*) *The Governor and Company of Copper Miners of England v. Fox*, 16 Q. B. 229 ; 20 L. J. (Q. B.) 174. (*y*) *London Dock Company v. Sinnott*, 27 L. J. (Q. B.) 129 ; 8 E. & B. 347.

while acting within the scope of the charter, it may enter into the commercial contracts usual in the trade which the company is to carry on, in the usual manner (z). Some acts of trifling importance which every corporation may do without deed, have been already mentioned.

Public or
Joint Stock
Companies.

There is another important class of parties to contracts, whose agreements must, in order to bind them as a body, be entered into in a manner peculiar to themselves. These are public or joint stock companies. Nearly all of these are of recent origin, most of them very recent. Some of these companies are incorporated, and others not, and some important attributes exist peculiar to different stages of their growth, from a mere party of individuals combining to promote the formation of a company, until they have achieved their object by effecting its incorporation. All these companies are created for some definite and prescribed object, and have already been slightly mentioned in treating of the power of corporations to contract. But the whole law respecting them is so new, and is in many respects so different from anything else existing in our jurisprudence, that the principles, analogies, and examples of the common law are often not applicable to cases where a public or joint stock company is one of the parties. It might, perhaps, have been more convenient for the purposes of com-

(z) *Copper Miners' Co. v. Fox*, supra.

mercial business, if, in establishing a new system of regulations for so many of the transactions of public companies, a closer analogy to the general rules of our law had been observed, as it certainly would have been more convenient for the purposes of public justice. But, in fact, a new system has been established ; and it affects so many of the transactions of business, that an accurate acquaintance with it is one of the most important acquirements of the lawyer. So far, therefore, as the law of public companies applies to the general law of contracts, it will be explained here ; but in order to do so, that interruption of the common analogies of law which I have mentioned, renders it necessary to speak somewhat generally of the old system before proceeding to the new.

Previously to the passing of the statutes hereafter mentioned, so great a number of joint stock companies had been established, and so many more were projected, each striving to attain its object by means of its own, none having any regard to the provisions of the law in analogous cases, and many violating them, that the greatest confusion and uncertainty were introduced into their transactions, and lamentable frauds and oppressions were committed. Several Acts of Parliament were passed remedying some of these evils, but being found insufficient, the Legislature passed some general enactments, of which the most important for the present purpose are, the Act for the Registration,

Statutes
regulating
joint stock
companies.

Incorporation, and Regulation of Joint Stock Companies, 7 & 8 Vict. c. 110, which came into operation on the 1st of November, 1844 ; the Companies Clauses Consolidation Act, 1845, 8 Vict. c. 16 ; the Lands Clauses Consolidation Act, 1845, 8 Vict. c. 18 ; and the Railways Clauses Consolidation Act, 1845, 8 Vict. c. 20. The statute 7 & 8 Vict. c. 110, was indeed repealed by 19 & 20 Vict. c. 47 ; but as to insurance companies registered under it, and as to new companies for insurance, it was revived by 20 & 21 Vict. c. 80. The statute 19 & 20 Vict. c. 47, now repealed, applied to companies the principle of limited liability. Existing companies might come under its operation, and joint stock banks established since May 5, 1844, were subjected to it by 20 & 21 Vict. c. 49. There was also a statute regulating joint stock banking companies, 7 Geo. IV. c. 46, by which, and by 7 & 8 Vict. c. 113, that important class of public companies were governed. Finally, there is the "Companies Act, 1862," 25 & 26 Vict. c. 89, which has repealed most of the former Acts, and has established a system which varies much from the ordinary rules of law, and which can be learnt only by a careful study of the statutes themselves, and of the decisions of the Courts upon the questions which have occurred in applying them to practice.

Nature of
joint stock
companies
without an
Act.

It will therefore be necessary to advert to some extent to the principles of the decisions pronounced before the Joint Stock Companies Act, 1856, both

for the sake of explaining the law applicable to such companies as do not come within its enactments, and to such questions, and they are many, as may arise as to more recent companies, and as may not be resolvable by the Act just mentioned. In most instances, however, it is evident that for many companies established before the passing of these Acts the law is different from that by which companies since established are regulated.

“A joint stock company is a partnership, consisting for the most part of a very large number of members, whose rights and liabilities would be precisely the same as those of any other partners, did not their multitude oblige them to adopt certain peculiar regulations for the government of the concern, which are ordinarily contained in an instrument called a deed of settlement. Such is a joint stock company, the conduct of whose affairs has not been affected by the general enactments, which have been mentioned. Such bodies still exist, but frequently the impossibility or great inconvenience of carrying on their business upon such a footing has induced them to add to the deed of settlement an Act of Parliament passed expressly for their own purposes” (a).

The first observation that occurs as to joint stock companies generally, in relation to the law of contracts, is that they are themselves, by virtue of

(a) Smith's Mercantile Law, 6th ed. by Dowdeswell, p. 59.

their very establishment, parties to a contract with the public, by which, in consideration of the benefits derived by them from the peculiar rights and privileges conferred upon them by the public, either in the general statutes, or in the Acts of Parliament by which they are individually constructed, they are bound not only to fulfil the duties they take upon themselves as prescribed in those statutes, but are liable, like other parties to contracts, to have their peculiar statutes construed as expressing the terms of a bargain made between them and the public, in which any ambiguity must be understood most strongly against themselves. Thus in the case of the *Stourbridge Canal Company v. Wheeley* (b), a canal had been made pursuant to Act of Parliament, by which all persons were to be at liberty to navigate thereon with boats upon payment of such rates and dues as should be demanded by the company, not exceeding certain rates mentioned, and the company were authorised to take certain rates and duties for every ton of iron and other goods navigated on any part of the canal, and which should pass through any one or more of the locks thereon ; and power was given to the owners of adjoining lands to use pleasure boats on the canal without paying dues, so that they were not used for carrying goods,

(b) 2 B. & Ad. 792 ; *Stockton & Darlington Railway Co. v. Barrett*, 3 M. & G. 956, Ex. Ch. ; 7 M. & G. 870, in Dom. Proc.

and did not pass through any lock. This canal was actually formed upon two levels, which were connected by a chain of locks, but there was no lock whatever upon the upper level. The defendants carried large quantities of coals and other goods in boats along the upper level, but without passing through any lock, and they were held not liable to pay any toll. "It is quite certain," said the Court of Queen's Bench, "that the company have no right *expressly* given to receive ~~any~~ compensation except the tonnage paid for goods carried through some of the locks, and it is therefore incumbent upon them to show that they have a right *clearly given by inference* from some of the other clauses. One of the clauses relied upon by the plaintiffs is that which gives the public the use of the canal; and it is contended that no persons have a right to use any part of the canal except those who pay some of the rates or dues, and, consequently, pass some of the locks, and that if individuals have no right to navigate a particular part, the company may make their own bargain as to the terms upon which they will permit them to do so. But the clause in question is capable of two constructions—one, that those persons who pass the locks, and therefore pay the rates, and those only, are entitled to navigate any part of the canal; the other, that all persons are entitled to use it, paying rates when rates are due. The former of these constructions is against the public, and in

favour of the company ; the latter is in favour of the public, and against the company, and is, therefore, according to the rule above laid down, the one which ought to be adopted.” “ When I look upon these Acts of Parliament,” said Lord *Eldon*, speaking of the Acts relating to the Glamorganshire Canal Navigation (c), “ I regard them all in the light of contracts made by the Legislature on behalf of every person interested in anything to be done under them ; and I have no hesitation in asserting that, unless that principle is applied in construing statutes of this description, they become instruments of greater oppression than anything in the whole system of administration under our Constitution. Such Acts of Parliament have now become extremely numerous ; and, from their number and operation, they so much affect individuals, that I apprehend those who come for them to Parliament do in effect undertake that they shall do and submit to whatever the Legislature empowers and compels them to do, and that they shall do nothing else ; that they shall do and forbear all that they are thereby required to do and forbear, as well with reference to the interest of the public as with reference to the interest of individuals. The parties are obliged to submit to the contract

(c) *Blakemore v. The Glamorganshire Canal Navigation*, 1 My. & K. 162 ; *York & N. Midland Ry. Co. v. The Queen*, 22 L. J. (Q. B.) 225, in Ex. Ch. ; 1 E. & B. 178 ; 2 E. & B. 68.

which the Legislature has made for them. The result is, that the contract shall be carried into execution, and the king's subjects are compelled to submit to it, upon the notion that it will be for the public good ; but they are not compelled to submit to anything except what the Legislature has said should be done." These rules have been applied to many cases, the principal of which are cited in the note below (d).

It is common, as you are no doubt aware, to companies generally, that the joint stock or capital is divided into equal parts, called shares, the number of which belonging to any member ascertains the amount which he has contributed to that stock or capital, and his consequent interest in the undertaking. The members or shareholders delegate all the ordinary business of the company to certain of its members, in whom they confide, and who are usually called directors, but reserve to themselves the right to interfere on specified occasions, together with a general control and superintendence.

It is also common to companies generally that, in all cases which are not regulated by the deed of settlement and the private, or, as it is called, special Act, or by one or other of the general statutes we

Common law
prevails where
not excluded
by agreement.

(d) *Kingston - upon - Hull Dock Co. v. Lamarche*, 8 B. & C. 42 ; *Priestly v. Foulds*, 2 M. & G. 196 ; *Rex v. Hungerford Market Co.*, 4 B. & Ad. 596 ; *Parker v. G. Western Ry.*, 7 M. & G. 253 ; *Thicknesse v. Lancaster Canal Co.*, 4 M. & W. 472.

have mentioned, the common law prevails, and the rules apply which would apply to an ordinary partnership (e); and, on the other hand, the parties, having exchanged their mutual rights at common law for those stipulated for in their deed, are bound by the latter, and cannot, as a general rule, act otherwise than in the stipulated manner. These results have been made very clear by the judgment of the Court of Exchequer, in *Bosanquet v. Shortridge* (f), in which case the deed of settlement had provided that no person should be registered as a shareholder without the consent of the board of directors; and it was endeavoured to be shown that the defendant had ceased to be a shareholder, having actually sold his shares to another, although the transfer was not with the consent of the board of directors. "It is necessary," said the Court, "that Courts of Justice should act on general rules, without regard to the hardship which in particular cases may result from their application. This is the case of a joint stock company regulated by deed. All persons executing the deed are bound by whatever is done in pursuance of its provisions, but they are bound no further. The original body of shareholders agreed to trade in partnership, and they further agreed that, by a certain stipulated,

(e) *Holmes v. Higgins*, 1 (Ch.) 49; *Kirk v. Bell*, 16 B. & C. 74; *Wilson v. Curzon*, 15 M. & W. 532. Q. B. 290; *Watson v. Eales*, 26 L. J. (Ch.) 361.

(f) 4 Exch. 699; 22 L. J.

mode, any one of this body might transfer his share to another, to be substituted in his place. But unless the steps pointed out by the deed for making such transfer have been duly taken, the original body of shareholders remain partners, according to the terms of their deed of settlement. If, indeed, a case could be conceived where all the shareholders, at a particular time, had assented to a mode of transfer different from that stipulated for in the deed, they might be bound by what they had so agreed to. But such a state of things could hardly happen to a joint stock company like that in which the defendant was a member; and certainly no such universal consent can be taken to have existed here." The defendant was held to be still a member.

It is perhaps known to you that partners cannot in general sue each other in a Court of law on contracts on the subject-matter of the partnership, such suits opening the state of the partnership accounts, which can only be satisfactorily dealt with by Courts of equity (*g*). This rule being found extremely inconvenient in cases of joint stock companies, it was usual for companies to endeavour to evade it, by providing in the deed of settlement that the members should not take advantage of it, but should be estopped from so doing. But it is very doubtful whether such a provision is valid; at

Members
suing each
other.

(*g*) See Smith's Mercantile Law, by Dowdeswell, 6th ed. p. 26.

all events, its validity has never been established. There is, however, nothing to prevent a member from recovering for work done and goods sold to the company before he became a member, or after he ceased to be one (*h*).

Transferring
shares.

Another great inconvenience felt by a joint stock company established by deed is, that no member can transfer his share without the consent of the rest ; for such a company being, in most particulars, an ordinary partnership, the consent of each partner is necessary to the introduction of a new one ; although it has been considered, that where the nature of the company was such that the members could not have intended that there should be no change in their body without their consent, such a consent was not necessary (*i*). Thus, great doubts and difficulties and disputes have unavoidably arisen in endeavouring to act without such consent. And in all ordinary cases the members have no peculiar rights or liabilities, but, as in ordinary partnership, are parties to all the contracts of the company, entitled to the benefit of them and responsible for their non-performance.

Company not
completed.

Where a projected company has never been completed, persons who have advanced money with the intention of becoming members of it, may, if it has become abortive or been abandoned, recover the

(*h*) *Lucas v. Beach*, 1 M. & Gr. 417. 119 ; *Waterford & Dublin Ry. Co. v. Pidcock*, 22 L. J.

(*i*) *Fox v. Clifton*, 9 Bing. (Ex.) 146 ; 8 Ex. 279.

money they have advanced (*k*). The mere fact of an applicant for shares having paid a deposit, does not make him responsible for any preliminary expenses where the undertaking has not come into operation (*l*); *à fortiori*, he may recover back money which he may have paid for shares, where he has been induced by fraudulent representations to join a mere bubble company (*m*). In the first of the cases just cited, it was admitted that a written application for shares which had been made by the plaintiff, and a letter of allotment allotting them to him, constituted a valid contract in themselves; but it was proved that many misrepresentations had been made, to which the defendant was a party, which had induced the plaintiff to pay money for the shares; and also that, although he had executed a deed, called the subscribers' agreement, yet he had so done under the same belief which had operated on his mind in paying his money. The Court of Common Pleas were of opinion, "that there was no contract binding the plaintiff to part with his

(*k*) *Nockles v. Crosby*, 3 B. & C. 814; *Walstab v. Spottiswoode*, 15 M. & W. 501; *Johnson v. Goslett*, 27 L. J. (C. P.) 122; 3 C. B. (N. S.) 69; *Beeching v. Lloyd*, 24 L. J. (Ch.) 679; *Chaplin v. Clarke*, 4 Ex. 403.

Brownlow, 26 L. J. (Ex.) 272; 2 H. & N. 455; *Galvanised Iron Co. v. Westoby*, 21 L. J. (Ex.) 302; 8 Ex. 17.

(*m*) *Wontner v. Shairp*, 4 C. B. 404; *Watson v. Charlemont*, 12 Q. B. 856; *Ashpitel v. Sercombe*, 5 Ex. 147.

(*l*) *Hutton v. Thompson*, 3 H. L. C. 161. See *Nixon v.*

money at the time when he paid the deposit. He had applied for sixty shares in a concern which was to have a capital of £3,000,000., raised by the issue of 120,000 shares. The committee allotted to him a very different thing, but professed to allot to him that which he had asked for; and the letter of allotment, as well as the prospectus and advertisements, described the capital as £3,000,000. and the number of shares as 120,000. Now, it might be reasonable to expect that such an undertaking would succeed with a capital of £3,000,000.; but perfectly absurd to suppose it could be accomplished for less than half that sum. The plaintiff, therefore, having asked for shares in a practicable scheme, received shares in a scheme that was impracticable, and which was rendered so by the act of the committee in refusing to allot more than 58,000 shares, although more than the whole 120,000 had been applied for by responsible parties. That which was allotted not being in truth that which the plaintiff had asked for, he was not bound to take it. Such being our opinion as to the alleged contract, we must inquire whether there was any evidence that the plaintiff was induced to pay his money by any fraudulent misrepresentation. If there was no fraudulent misrepresentation, the plaintiff ought to have been nonsuited, or a verdict should have been found for the defendant; but we think there was ample evidence of such misrepresentation. If we are to construe the

advertisement, we think it means that all the shares had been allotted ; and as it was a public advertisement, at least it must be taken to have been addressed to all who were interested in the subject-matter of it, of whom the plaintiff was undoubtedly one : to him it represented that he had got what he asked for, namely, sixty out of 120,000 shares in the proposed adventure. The jury, therefore, were well warranted in finding that the representation so made was a material inducement to him to pay his money. If the meaning of the advertisement was for the jury, they appear to have construed it as we do. Either way there was ample evidence to be left to the jury on this point, and there is no ground for either a nonsuit or a verdict for the defendant."

On the other hand, "where a prospectus is issued, and shares allotted for a speculation, to be carried on by means of a certain capital to be raised in a certain number of shares, a subscriber is not liable in the first instance, unless the terms of the prospectus in that respect are fulfilled ; but if it be shown that he knows the directors are carrying on the undertaking with a less capital, and has acquiesced in their so doing, he may become answerable for their future contracts " (*n*). And as he is thus liable to the creditors of the company, he cannot complain of being compelled to fulfil his engagements with the other members.

May become
liable by
acquiescence.

(*n*) *Pitchford v. Davis*, 5 M. & W. 2.

It is important to remember that, although, as has been seen, a person will not become a partner where the original intention is not carried out, or where he has been induced by fraudulent misrepresentations to take shares, or where preliminary proceedings necessary for the establishment of the partnership are not completed ; yet he may, of course, by his conduct, as well as by his words, acquiesce in what has been done : and, if he does so, he will become as liable in the one case as in the other ; and when the partnership has once begun, whatever contract the managing persons make, which is a proper and usual contract for persons who carry on that kind of business to make, each member will be liable upon it, though contrary to the original stipulation (o).

Provisional
committee.

Persons interested in promoting the establishment of a company were frequently, before the passing of the statutes already mentioned, induced to form themselves into what was called a provisional committee of such company. They also often persuaded the most respectable of their friends to join them ; and very numerous, indeed, were the instances in which they found themselves liable for enormous debts incurred by other members of the committee in proceedings preliminary to the formation of the company.

(o) *Hawken v. Bourne*, 8 M. & W. 703 ; *Tredwen v. Bourne*, 6 M. & W. 461 ; in *re Norwich Yarn Co.*, 25 L. J. (Ch.) 601.

This injustice is now to a great extent prevented by the Act for the registration of joint stock companies, which will presently be mentioned. The mere facts of their allowing their names to be inserted in a prospectus, and published to the world as members of such a committee, of attending such a committee, although only for the purpose of objecting to what was done, and any slight evidence that they knew that their names had been published as committee-men by other people, were often considered sufficient to render them liable upon contracts for a projected company; and many hundreds of people were ruined by their supposed liability. Yet it is quite clear that these facts alone are not sufficient to make them liable. They are evidence of a connection with such a committee, and with the projected company; but the question is, whether such persons authorised other members of the committee to pledge their credit for matters necessary to the formation of the company. All their acts in relation to the company are proper evidence upon this question. But they do not pledge their credit by the mere fact of their being members of the committee, or by accepting shares, or by paying a deposit upon them (*p*); *à fortiori*, it will not render them liable for debts incurred

(*p*) *Reynell v. Lewis, Wylde Argyle*, 6 M. & Gr. 928;
v. Hopkins, 15 M. & W. 517; *Hutton v. Thompson*, 3 H. L.
Lake v. Duke of Argyle, 6 C. 161; *Norris v. Cottle*, 2
Q. B. 477; *Wood v. Duke of* H. L. C. 647.

before they began to act (*q*). But where they give each other, or a secretary, apparently the power to bind them, they will be liable upon contracts made by him in their names, although they expressly prohibit him so to do. Provisional directors of a projected joint stock company, who were induced to become such by the representations of the nominal secretary (the getter up of the company), that he would pay the preliminary expenses, and that they should not be liable, passed a resolution *inter alia* that the company should be advertised. The secretary agreed with the plaintiff for advertising the company, showing him the resolution of the directors, but not informing him of the above understanding with the directors. Held, the directors were liable to plaintiff for the advertisements (*r*).

Transfer of
shares.

It may be worth while to mention here that shares in a joint stock company, although it be seised of land and possessed of goods as well as of the property in which it commonly deals, do not fall within the 4th section of the Statute of Frauds (*s*) as an interest in land, or within the 17th section (*s*) as goods, wares, or merchandize; but, in the absence of any enactment making them the one or the other, are personal property and mere

(*q*) *Barnett v. Lambert*, 15 M. & W. 489.

(*r*) *Maddick v. Marshall*, C. P. April 16, 1864; 12 W. R. 687.

(*s*) *Humble v. Mitchell*, 11 A. & E. 205; *Tempest v. Kilner*, 3 C. B. 249; *Boelby v. Bell*, Id. 284; *supra*, p. 126.

choses in action, and consequently are transferable by parol (*t*). But in fact the general statute prescribes the modes in which, under the operation of that statute, such shares may be granted by the company and transferred from holder to holder ; and various modes for attaining these purposes are prescribed in the particular Acts regulating many of the companies which were established before that enactment.

If the approbation of the directors be required as a preliminary to the transfer, it must of course be procured (*u*), and that by the vendor, who must do everything necessary to vest the property in the purchaser (*x*), although it is generally for the purchaser to prepare and tender the conveyance (*y*). And therefore, when the shares are by the provisions of an Act of Parliament transferable by deed only, the purchaser must tender a deed to the seller for execution before he can sue for not transferring them ; and a sealed instrument of transfer, having the name of the vendee in blank at the time when it is sealed and delivered, is invalid, not being a legal deed (*z*).

When a person has become a member of a joint How rendered
liable.

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| <p>(<i>t</i>) <i>Hibblewhite v. M'Morine</i>, 6 M. & W. 214.</p> <p>(<i>u</i>) <i>Bosanquet v. Shortridge</i>, 20 L. J. (Ex.) 57 ; 4 Exch. 699, S. C.</p> <p>(<i>x</i>) <i>Ibid.</i> ; <i>Wilkinson v.</i></p> | <p><i>Lloyd</i>, 7 Q. B. 27.</p> <p>(<i>y</i>) <i>Stephens v. De Medina</i>, 4 Q. B. 422.</p> <p>(<i>z</i>) <i>Hibblewhite v. M'Morine</i>, 6 M. & W. 200.</p> |
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stock company, he is in all ordinary cases, unless exempted by the private or general statute, entitled to the benefits of all its contracts, and responsible for the engagements of the company made by the agents of the concern in order to carry out its purposes (a). But, in order to charge the company or any member upon a contract, it must be proved to have been made by persons having authority from all the shareholders to bind them by such a contract; and this may be done by proving that it was sanctioned by the persons authorised by the deed of the company to conduct its affairs (b). But the claimant is not confined to the deed for proof of authority. He may show in any way that the whole of the shareholders have directly or indirectly given authority to those making the contract to bind them; but to show merely that some of the directors have ordered or approved of the contract is not sufficient without also showing, that, by the deed or otherwise, they were authorised so to do. Therefore where the deed appointed eleven directors, and declared five to be a quorum, the company was held not bound by a contract made at a board where three only were present: and this although the company was completely registered under 7 & 8 Vict. c. 110 (b). And, on the other hand, where a

(a) *Harvey v. Kay*, 9 B. & 252; 2 Ex. 711, S. C. See C. 356. *Howbeach Coal Co. v. Teague*,

(b) *Ridley v. Plymouth Baking Co.*, 17 L. J. (Ex.) 137.

manufacturing company had appointed a manager to superintend and transact its manufacturing business, but the general business was to be transacted by a board of directors, who had power to appoint officers and delegate their authority, and goods for the manufacture had been ordered by the manager, the chairman, the deputy-chairman, and the secretary, and were used for the company's purposes, the Court of Common Pleas considered, that, although, with the exception of the manager, none of these officers had authority to give such orders, and although the directors did not expressly adopt them, yet, as they knew they had been so furnished, the company was liable (c).

It will probably appear quite clear from what has been said before, and if not, it is sufficiently so from the very nature of the thing, that the contracts to which a member of a joint stock company becomes liable, because they are made by the agents of the company or certain of its members, must be contracts either expressly authorised by him, or appropriate, in order to carry out the purposes for which the company was formed. Thus, in the celebrated case of *Dickenson v. Valpy* (d), which was an action on a bill of exchange, purporting to be drawn and accepted by a mining company, wherein the plaintiff, an indorsee for value, sought to charge the defendant as a member of that com-

(c) *Smith v. Hull Glass Co.*, B. 897.
 21 L. J. (C. P.) 106 ; 11 C. L. R. & C. 128.

pany, the Court of Queen's Bench held that, assuming the defendant to be a member of that company, it was incumbent on the plaintiff to prove that the directors of the company had authority to bind the other members, by drawing and accepting bills of exchange; and that the plaintiff, not having produced the deed of co-partnership, nor given any evidence to show that it was necessary for the purpose of carrying on the business of a mining company, or that it was usual for them to draw or accept bills of exchange, there was no evidence of such authority to draw or accept them. "There was not any evidence," said *Parke, J.* (afterwards Lord *Wensleydale*), "to prove an authority of the parties in this concern to draw such a bill of exchange as this. I very much doubt whether there is any authority in mining companies, arising by implication from the nature of their dealings, to draw or accept bills of exchange; and it is to be observed, that there was no proof of any usage to do this in such companies. The argument would go to this, that all persons who deal in the produce of the land, which they jointly occupy, because they might sell that produce at a distance, would have an implied power given to each other to draw bills of exchange for the purpose of receiving payment for it; if the argument was valid it would show that farmers acting in partnership, as well as miners, would have, as incidental to the relation of partners, an authority to draw bills of exchange

upon the persons to whom the produce of the land was sold ; there is, however, no necessity to decide that point, because there is no ground, at all events, to say that mining partners have an implied authority from one another, arising from the nature of their business, to draw such a bill of exchange as this, for, upon the face of it, this is a bill drawn by the company upon themselves, and though it is in form treated as a bill of exchange, it is in substance only a promissory note ; and the effect of saying that one member of a company like this can draw such bills or notes, would be, that each of the partners in the concern would have the power of pledging the others." Still more general was the language of *Tindal*, C. J., in delivering the judgment of the Court of Common Pleas in the case of *Bramah v. Roberts* (e). In that case a bill had been drawn by one of the directors of a gas company on himself and the other directors, which was accepted by the chairman for himself and the other directors. This acceptance was held not to bind them. It has been decided that, in the absence of proof to the contrary, one member of a joint stock company cannot bind the remainder by negotiable instruments. "The address of a bill," said the Chief Justice, "to the directors of a metropolitan company, and the frame of acceptance by the chairman of such directors, for himself and the

(e) 3 Bing. N. C. 963.

other directors, can only be referable, unless some explanation is given, to a company of the description well known in all the Courts of law and equity in Westminster Hall as joint stock companies, and not to ordinary partnerships in trade. It was proved upon the trial of the cause, that Clare, the drawer of the bill, from whom the plaintiffs derived title, and upon whose indorsement they rely, was the same William Clare who was one of the acceptors and one of the defendants in his capacity of acceptor; so that the bill is drawn by one of the directors upon himself and the other directors, payable to his own order, and accepted by another director for himself and the rest. But the right of one director to draw a bill upon the rest, and still further, the power of one director to accept a bill for himself and the others, so as to make those others liable, according to the case of *Dickenson v. Valpy* (*f*), in the authority of which case we entirely concur, is not a right or power implied by law, like that which belongs to one member of an ordinary partnership in trade with respect to bills drawn and accepted for the purposes of the trade. It must depend upon the powers given by the charter or deed or agreement under which the company is established and constituted, or some other agreement between the parties, whether a bill so drawn and accepted shall or shall not have

(*f*) 10 B. & C. 128.

that legal effect. But upon the trial of this cause, no evidence whatever was given by the plaintiffs of the constitution of this company, nor of any authority given, by deed, or otherwise to any one of the directors to bind the other directors, or to bind the company at large, by his acceptance of bills of exchange; and in the absence of such evidence, we are of opinion that no such authority is to be implied by law, or can be held to exist."

With regard to the borrowing of money, unless it be part of the ordinary business of the company, as it would be of a banking company (*g*), or express powers be given them by the deed, the directors have no authority to pledge the credit of the shareholders by borrowing money, even though it be necessary to enable them to carry on the affairs of the company (*h*). It has since been held that, even a clause in the deed of settlement, under which a mining company was carried on, which provided that the affairs and business of the company should be under the sole and entire control of the directors, of whom there should not be less than five or more than nine, and that three of them should at all meetings of directors, and for all purposes, be competent to act, did not authorise them to borrow money for the necessary purposes of the mines (*i*).

(*g*) *Bank of Australasia v. C. B. 686.*
Breillat, 6 Moore P. C. C. (*i*) *Burmester v. Norris*, 21
 152. L. J. (Ex.) 43; 6 Ex. 796,
 (*h*) *Ricketts v. Bennett*, 4 S. C.

As to dealing on credit, the question whether the company may be made liable by its agents so dealing, depends, like the others we have been considering, upon the authority given to those agents ; and this authority, as in other cases, may be proved by showing it to have been actually given, or that concerns of the nature in question are ordinarily so carried on. "The question," said Lord Abinger, "which was decided in *Dickenson v. Valpy*, that a mining company is not necessarily formed with a power to pledge the credit of individual members by the drawing of bills, is very different from the question whether it is not formed with power to bind them by dealing on credit ; whether the directors have such a power, must depend on the general nature of the concern ; it is a matter for the jury to decide upon, unless the party gives evidence to show that their authority was expressly limited, and if it had been left to the jury in this case, I think they would not have had much difficulty in saying that it is in the general nature of mining concerns to deal on credit for the purpose of carrying on their business" (k). This distinction between borrowing and dealing on credit has been upheld by the Court of Chancery (l).

It is impossible within the limits of this work to enter even upon the subjects comprised within the

(k) *Tredwen v. Bourne*, 6 M. & W. 465 ; *Hawken v. Bourne*, 8 M. & W. 703. (l) *In re the German Mining Co.*, 22 L. J. (Ch.) 926.

Railway Clauses Act, the Lands Clauses Act, the Companies Clauses Consolidation Act, or the Acts regulating Joint Stock Banking Companies. All that can be done consistently with the present object in addition to what has been said is, to give a general view of the Law of Contracts as applied by the general Act so often referred to, and known as the Companies Act, 1862.

By virtue of the Companies Act, 1862, any number of persons not less than seven may, by using the modes prescribed by that statute, form themselves into an incorporated company so as to obtain the advantages given them thereby. These modes are amongst other things the registration, in an office provided for that purpose, of a document called the memorandum of association, which memorandum is to declare the name of the company, its objects, capital, number of shares into which its capital is divided, the liability of its shareholders whether limited or unlimited, and the part of the United Kingdom in which its registered office is to be established. The effect of this memorandum when registered, binds the company and the shareholders in the same manner as a covenant to conform to all the regulations of the memorandum would bind them. It is clear, therefore, that the name of the company will thereafter be that which is declared in the memorandum of association until altered in a legal manner, and by this name only can it contract, so that the rights and liabilities

provided by the statute shall attach to it by the contract. More precise regulations may also be made according to a form provided by the statute to accompany the memorandum of association, which are called articles of association. These also bind the shareholders and the company as if they had respectively covenanted to the same effect, and these or such of them as are chosen by the company being registered, and the registrar having certified that the company is incorporated, the shareholders become a body corporate by the name in the memorandum of association. But it must be remembered that if twenty persons or more after the 2nd of November, 1862, carry on in partnership any trade or business having gain for its object, unless so registered or authorised by private statute, or engaged in mining in the Stannaries, each of them may be sued for the whole debts of the co-partnership without joining any other member.

The objects for which the company is established being thus defined, must be reasonably adhered to in the transactions of the company. I do not find that this rule has been much illustrated during the existence of this statute ; but it would seem that cases illustrating the operation of other statutes upon similar questions would be applicable upon the present question. Thus, it has been held that a railway company incorporated by Act of Parliament is bound to apply all the funds of the company for the purposes directed and provided for by

that Act, and for no others ; and therefore, where a railway company was incorporated by statute for the purpose of making and maintaining a particular railway, and for other purposes therein declared, and they were empowered to raise money for making and maintaining that railway, which money was to be expended towards those purposes and otherwise in carrying the Act into execution, and after paying these expenses the profits were to be divided among the proprietors, the purposes mentioned in the statute were held to be confined to acts to be done upon and relating to the railway to be made by the company. The company covenanted with the plaintiffs, another railway company, to take a lease of their railway, and to pay the costs of soliciting Bills then pending in Parliament, by which the plaintiffs were to be authorised to make extensions of their railways. These covenants were held to be beyond the scope of their authority as a corporation, and therefore illegal and void, however beneficial to their railways the objects of the covenant might be (m). So in the case of the *Shrewsbury and Birmingham Railway Company v. North Western Railway Company and Shrop-*

(m) *East Anglian Ry. Co. v. Eastern Counties Ry. Co.*, 21 L. J. (C. P.) 23 ; 11 C. B. 775 ; *South Yorkshire Ry. Co. and River Dun Co. v. Great Northern Ry. Co.*, 22 L. J. (Ex.) 305 ; 9 Ex. 55 ; S. C. in Ex. Ch., 23 L. J. (Ex.) 186 ; *Macgregor v. Deal and Dover Ry. Co.*, 22 L. J. (Q. B.) 69 ; 18 Q. B. 618 ; *Munt v. Shrewsbury & Chester Ry. Co.*, 20 L. J. (Ch.) 169 ; 13 Beav. 1.

shire Union Railway Company (n), the House of Lords decided that although, *prima facie*, all corporate bodies are bound by contracts under their common seal, yet this *prima facie* power to contract cannot be insisted on as to matters where, from the nature of the corporate body or the object of its incorporation, it is expressly or impliedly by reasonable inference prohibited from contracting.

Before quitting this subject, however, I would direct the reader's attention to the remarkable case of *Bostock v. North Staffordshire Railway Company* (o), which, although the judges differed in opinion, is highly instructive for the learned and important arguments by which their several opinions were supported. This case is also especially remarkable in being, as I believe, nearly, if not quite, the only instance in which a fee simple has been held to pass without the absolute power of using the land in any lawful manner which the owner may think fit.

Having, therefore, thus delineated the name by which a public company may contract, and the sort of contracts which it may make, we come to consider the manner in which it may make them. The Joint Stock Companies Act, 1856, sec. 41, enacted

(n) 6 H. L. C. 113. See *North Staffordshire Ry. Co., Copper Miners' Co. v. Fox*, 25 L. J. (Ch.) 325. See *Astley v. Manchester, Sheffield, and* ante, p. 345.

(o) 24 L. J. (Q. B.) 225; *Lincolnshire Ry. Co.*, 27 L. J. 4 E. & B. 798; *Bostock v.* (Ch.) 299; 27 L. J. (Ch.) 478.

that contracts on behalf of any company registered under this Act might be made in the same manner as similar contracts are made between private individuals—by deed if required by law to be under seal, by writing signed, if the law required such a writing, or by parol, if a parol contract would be valid between private persons.

This enactment has been repealed by the Companies Act, 1862, and no form of contracting substituted; but as companies registered under this Act are incorporated by sec. 18, the modes by which a corporation contracts are in general applicable to them.

It may serve to illustrate the law in this respect to observe that it has been held, in a case where the deed of settlement of a joint stock insurance company, established and registered under the 7 & 8 Victoria, c. 110, provided that the common seal should not be affixed to any policy except by an order signed by three of the directors and countersigned by the manager, that a policy to which the common seal had been affixed by the proper officers, which was *bonâ fide* effected by the assured, and was otherwise in accordance with the deed of settlement, was not rendered invalid by want of the required order to affix the seal (*p*).

By s. 55, the company, by instrument under their common seal, may empower any person as

(*p*) *Prince of Wales Ass. Co. v. Harding*, 27 L. J. (Q. B.) 297; 1 E. B. & F. 183.

their attorney to execute deeds in their behalf anywhere out of the United Kingdom, and any deed so signed by the attorney on behalf of the company and under his seal shall be as binding as if under the company's seal.

By s. 47, bills of exchange and promissory notes shall be deemed to have been made, accepted, or indorsed on behalf of any company under this Act, if made, accepted, or indorsed, in the name of the company by any one acting under their express or implied authority, or if made, accepted, or indorsed by or on behalf of the company by any person acting under the authority of the company, and will be binding on them. Where a promissory note was made in this form: "Three months after date we jointly promise to pay to F. G. or order £600. for value received in stock, on account of the London and Birmingham Iron and Hardware Company, Limited. Payable at the London Joint Stock Bank, Princes Street, Mansion House.—William Melrose, H. W. Wood, John Harris, Directors; Edwin Guest, Secretary,"—the Court considered that the note was made in the name of the company within the Act, and was therefore binding on the company, and not on the directors who signed it (*q*).

Preserving the forms thus required, a joint stock

(*q*) *Linden v. Melrose*, 27 L. J. (Ex.) 326; 3 H. & N. 177. See *Smith v. Johnson*, Id. 363; 3 H. & N. 222; *Penrose v. Martin*, 28 L. J. (Q. B.) 28.

company may enter into any lawful contracts requisite to attain the objects for which it was established. Bearing in mind what has been said of the illegality of contracts *ultra vires* of the company, it will probably not be very difficult to determine whether any proposed contract is such as will bind the company with regard to the objects declared in the memorandum and articles of association. Upon such contracts the company thus incorporated may sue and be sued like any other corporation. If the company, on judgment being obtained against it, does not pay or satisfy the judgment, and execution issued thereon is unsatisfied in whole or part, the company shall be deemed unable to pay its debts (s. 80), and proceedings may then be taken for winding up the company, as it is called (s. 79). The result of these as to the liability of the existing shareholders is, that they shall upon the winding up be liable to contribute to the assets of the company, to an amount sufficient to pay its debts, and the costs, charges, and expenses of winding it up ; but if the company is limited, each shareholder will be liable to contribute to the assets of the company to the amount, if any, which may remain unpaid on the shares held or the amount guaranteed by him (ss. 38, 90, 134). Moreover, no person who has ceased to be a shareholder for the period of one year prior to the commencement of the winding up, shall be liable to contribute to those assets

past mem-

ber be liable in respect of any debts of the company contracted since he ceased to be a shareholder (s. 38). But if the company being wound up be limited, no past or present member can be made to contribute more than the amount unpaid on his share, or the amount he has guaranteed; nor, whether the company be limited or not, shall any past member be liable to contribute, unless the existing members are unable to satisfy the contributions required. But with respect to the liability of any person to contribute to the assets of a company registered under the Act, in the event of its being wound up, this shall be deemed to create a debt accruing due from such person at the time when his liability commenced, but payable at the times when calls shall be made for enforcing such liability (s. 75).

As to the rights of shareholders against the company, every person who has accepted any share in a company registered under this Act, and whose name is entered in the register of members, shall for the purposes of this Act be deemed a member. The transfer of any share may be in a form provided by the Act, and to be executed by transferror and transferee; but the transferror shall be deemed to remain a holder of his share until the name of the transferee is entered on the register, and the title of every shareholder to his shares shall be a certificate under the common seal of the company specifying the shares held by him. Finally, the amount of

calls for the time being unpaid on his shares shall be deemed a debt due from the shareholder to the company (ss. 23, 31, Table A).

These are the chief rules and decisions respecting the peculiarities of the contracts of joint stock companies, which approach to the nature of general principles ; but it is impossible to understand the subject without a careful study of the statutes which have been here mentioned, and of the decisions by which those statutes have been applied. It has come to be one of the largest classes of the law of England. It cannot be said to have yet assumed a certain, well defined, and satisfactory form (although the statute so often referred to, the Companies Act, 1862, is composed with a degree of knowledge and clearness seldom equalled in our statute-book), but it is hoped that the foregoing slight sketch will give the student some advantage in entering upon the study of the statutes and decisions. He is strongly recommended to study the latter, always, in the view of their being illustrations and applications of the former. By keeping the terms of the former in his mind, the latter will appear to have a consistency and clearness which they will not otherwise be supposed to possess, and he will be enabled to apply the statutes to new cases with an accuracy and facility not to be acquired otherwise. In undertaking this labour, he will find it much facilitated by taking as his guide to the decisions the chapter on Joint Stock Companies in the last

edition of Smith's Mercantile Law, by Mr. Dowdeswell, where the statutes are abridged and the leading decisions arranged with singular fulness, clearness, and brevity.

Agents.

I have now specified the various classes of parties with regard to whose competency to enter into contracts I had any particular observations to make ; and now, assuming that none of the various cases of disability which I have mentioned arises, but that the parties entering into the contract are competent by law to do so, there remains one other very important subject to advert to, namely, the mode in which they may become parties to the contract. And this must be in one of two ways ; either personally or by the intervention of an agent.

Contracts by agents.

There are few branches, perhaps no branch, of the law of England, to which it becomes so often necessary to refer, as that which regulates the rights of parties under contracts made by agents. The truth is, that, as society is now constituted, the business of life has become so complicated, that "no man's individual efforts can embrace all the subjects with which he is called on to deal." Hence we are obliged to transact a variety of business and enter into a variety of engagements through the medium of agents, the precise effect of whose acts in binding or advantaging us becomes of course a matter of the utmost practical importance. I cannot, however, attempt to do more than state the general

principles by which the subject (so far as relates to contracts) is regulated.

Generally speaking, whatever contract a man may enter into in his own person, he may, if he think fit, appoint an agent to enter into in his behalf. There are, indeed, one or two exceptions to this rule, which arise out of the wording of certain Acts of Parliament, requiring the intervention of the principal party himself in certain contracts. For instance, a man cannot appoint an agent to sign a writing for the purpose of exempting a case from the operation of the Statute of Limitations (*r*), or make the acknowledgment in writing to the person entitled to land or rent which is to be equivalent to possession or receipt of rent, under 3 & 4 Will. IV., c. 27, s. 14 (*s*). Nor can a person who objects to the name of another being retained upon the list of voters in a parliamentary borough, empower an agent to sign the objection for him (*t*). In the former of these cases, the statute 9 Geo. IV., c. 14, requires the writing to be signed by the party chargeable thereby; and in the latter, the 6 & 7 Vict. c. 18, s. 100, requires every notice of objection to be signed by the person objecting. But it seems that, unless strictly required to be signed by the principal, it is sufficient if a contract,

Who may
appoint an
agent.

(*r*) *Hyde v. Johnson*, 2 Bing. N. C. 776.

(*t*) *Toms, app., Cuming, resp.*, 7 M. & Gr. 88. See

(*s*) *Ley v. Peter*, 27 L. J. C. P., 239; 3 H. N. 101. *Davies v. Hopkins*, 27 L. J. (C. P.) 6; 3 C. B. (N. S.) 37^c

required to be in writing, be signed by an authorised agent (*u*).

But, generally speaking, whatever contract a man may lawfully enter into himself, he may appoint an agent to enter into for him. There is, however, another extensive and important exception to this rule, which takes place when a man is himself an agent (*x*). He cannot, in this instance, appoint an agent to transact the matters entrusted to his own agency. The exception evidently arises from the very nature of his own appointment; for it is one thing to trust a man's discretion to transact your affairs, and for which you may know him to be quite competent, but altogether another and a different thing to trust his discretion to select a stranger to transact your affairs at your responsibility. The maxims of law, therefore, are—“*Delegatus non potest delegare*,” and “*Vicarius non habet vicarium*”—maxims which, it is obvious, are necessary for the principal's protection, but which, it is clear, cannot apply where you expressly give your agent power to appoint a deputy (*y*).

Now the considerations on which I shall have occasion to touch, relate to one of four points into which what I have to say on this subject may be

(*u*) *Morton v. Copeland*, 24 930; *Cockran v. Islam*, 2 M. L. J. (C. P.) 169; 16 C. B. & Selw. 301, n. 517.

(*x*) *Combe's case*, 9 Co. 76 3 Bing. N. C. 817; *Lord v. Cobb v. Becke*, 6 Q. B. Hall, 8 C. B. 627.

(*y*) *Moon v. Whitney Union*,

conveniently enough distributed ; and they relate to the questions—

1. *Who may be an agent*, 383.
2. *How an agent is appointed*, 387.
3. *How far his contracts bind his principal*, 388.
4. *How far the principal may be advantaged by them*, 408.

Now, with regard to the *first* point, namely, *who* Who may be an agent. is competent to be an agent, I have to observe, that it by no means follows that a person who is not competent to contract himself is therefore not competent to contract as agent for another person ; thus it has been decided that an infant may be an agent, or even a married woman, though she could not have contracted in her own right. Thus, where a married woman kept a school, at which the defendant had placed his daughter, and drew upon him a bill for the expenses of the daughter's education, which bill she endorsed to the plaintiff, and the drawing and indorsing of the bill were both in the wife's name, but with the husband's assent, and he also obtained the value of the bill from the plaintiff, it was considered that there was ample evidence of the husband having authorised the drawing and indorsing of the bill, and that there was nothing to prevent his making his wife his agent for that purpose (z). In a very similar

(z) *Prestwick v. Marshall*, *natte*, 1 Bing. N. C. 435. See 7 Bing. 565 ; *Prince v. Bru-* 8 C. B. *supra*.

case, where a wife accepted in her own name a bill drawn upon her husband, and his authority was proved, he was held liable. To the objection that a drawee cannot bind himself otherwise than by writing his own name on the bill, which you are no doubt aware is the general practice in accepting bills, it was asked, would he not be liable if, with his own hand, he had accepted the bill by writing another's name across? The only difference was, that he had done so by the hand of his wife. Had he done it with his own hand, it clearly would have been his own acceptance, and the Court held that there was no rule of law which made such an authority void. Nobody but the defendant could have accepted the bill so as to bind, and he accepted it by the hand and in the name of his wife (a) "Few persons," says Lord *Coke*, "are disabled to be private attorneys to deliver seisin; for monks, infants, femmes covert, persons attainted, outlawed, excommunicated, villains, aliens, may be attorneys." It is hardly necessary to say that the attorney mentioned here is the agent properly authorised for the purpose required. It will be obvious that the general reason why persons incapacitated to contract may, notwithstanding their incapacity, act as agents in the contracts of others, is that their incapacity is personal, and that such contracts are not their own, but the contracts of those whose agents they are.

(a) *Lindus v. Bradwell*, 5 C. B. 583.

But it is held that, under the Statute of Frauds, Agent under Statute of Frauds. one of two parties entering into a contract, such as we have seen that Act requires should be in writing and signed by the party to be charged thereby, cannot be agent for the other, even with that other's consent, so as to bind him by his signature to such a writing (b). Thus, where the plaintiff, an auctioneer, sued the defendant for not paying for goods purchased by him, and, the goods not having been delivered, the only evidence of the contract was the book kept by the plaintiff as an auctioneer, in which he had duly entered the different biddings opposite the lots ; the Court of King's Bench held that, although in general an auctioneer may be considered as the agent and witness of both parties (the vendor and the purchaser), yet when he elects, as he may do, to be himself as one of the contracting parties, the agent who is to bind a defendant by his signature must be some third person, and not one of the contracting parties on the record. To allow it, indeed, would seem to amount to a direct dispensation with the signature of the party to be bound, which, whether by his own or his agent's hand, the statute requires. But it seems to be no violation of this requirement,—the hand of the agent or of the principal,—that the *agent* of the one party should act as the agent of the other, although, of course, in such a case clear evidence

(b) *Wright v. Dannah*, 2 *Simmons*, 5 B. & Ald. 333.
Camp. 203 ; *Farebrother v.*

would be required to show his authority, constituting him the agent of the latter. Thus, in an action by an auctioneer against a purchaser of goods sold by auction, the entry in the auctioneer's sale-book, made by the auctioneer's clerk who was assisting at the sale, and as each lot was knocked down named the purchaser aloud, and on assent from him made an entry of the sale to him, is a sufficient memorandum within the 17th section of the Statute of Frauds, the clerk being, in the first instance, the agent of the auctioneer, and constituted the agent of the purchaser by the assent of the latter, when told by the clerk that the lot was knocked down to him (c). But where the traveller of a wholesale dealer, calling on a shopkeeper to sell his principal's goods, and having by parol sold him certain sugar, was desired by the latter to make, in his (the shopkeeper's) book, a memorandum of the transaction, and thereupon made the following—"Of North & Co., 30 mats Maurs. at 71s., cash 2 months, Fennings' Wharf," and signed it with his own name; the sugar having been destroyed before it was delivered, it became necessary to prove the sale by a written memorandum; but these facts were held insufficient to show that the traveller was constituted the agent of the shopkeeper to bind him under the statute (d). Indeed, it seems clear, as observed in

(c) *Bird v. Boulter*, 4 B. & Ad. 443.

(d) *Graham v. Musson*, 5 Bing. N. C. 603; *Graham v.*

the case, that the signing of the entry in the defendant's book would tend to make it obligatory on the plaintiff rather than on the defendant.

With regard to the second point, namely, in what manner an agent is to be appointed:—Whenever there is no particular rule of law or special statutory provision pointing out a particular mode of appointment, he may be appointed even by bare words. But there are some cases in which the common or statute law *does* require a particular mode of appointment; for instance, it is a rule of common law, that an agent who is to contract for his principal by deed, must himself be appointed by deed (*e*).

Agents—how
appointed.

Again, a corporation, as it can, generally speaking, do no act except by deed; so it cannot, generally speaking, appoint an agent in any other way. There are, indeed, one or two exceptions to this, as you have seen there are to the rule which obliges them to contract by deed, particularly in the cases of trading companies. You will find the rule and the exceptions discussed in *Dunston v. Imperial Gas Light Company* (*f*). With regard to the case of a statute requiring a particular mode of appointment, you may take, for example, the Statute of Frauds, the 1st, 2nd, and 3rd sections of which require, in express terms, that the agent who is to do any of

Fretwell, 3 M. & Gr. 368; (*e*) *Harrison v. Jackson*, 7
Mews v. Carr, 26 L. J. (Ex.) T. R. 209.
 39; 1 H. & N. 484. (*f*) 3 B. & Ad. 125.

the acts mentioned in those sections shall be appointed by writing, whereas the 4th and 17th sections contain no such provision. The consequence, of course, is, that in cases within these latter sections the agent's authority need not be in writing (g).

Where the principal is bound by the agent's contract.

With regard to the third point, namely, in what cases the principal is bound by his agent's contract:—It is, of course, obvious at first sight, that, so far as the agent's authority extends, his principal is bound by all acts done in pursuance of that authority. So far there can be no doubt or difficulty whatever. But the cases in which doubts and difficulties arise, are those in which the agent has gone beyond his authority—has made some contract which his instructions do not authorise; and then the question arises whether his principal shall or shall not be bound by it. Now, in order to solve this question, it is necessary, in the first instance, to understand the distinction between *general* and *particular* agency. A general agent is an agent entrusted with all his principal's business in some specific line, of some specific kind. A particular agent is an agent employed specially for some one special purpose. For instance, if I entrust another with the sale of a particular horse, of which I am desirous of disposing, he is a *particular* agent to transact that particular business (h). But if I appoint an agent to sell all my horses, and

Where the agent has exceeded his authority.

Distinction between particular and general agents.

(g) *Emmerson v. Heelis*, 2 Taunt. 46.

(h) *Brody v. Tod*, 30 L. J. (C. P.) 223.

consign horses to him from time to time for sale, he is my *general* agent in that line of business. Now, there is this important distinction between contracts made by general, and those made by particular, agents—namely, that if a particular agent exceed his authority, his principal is not bound by what he does ; whereas, if a general agent exceed his authority, his principal is bound, provided what he does is within the ordinary and usual scope of the business he is deputed to transact. . For instance, if I employ A. to carry a bale of cottons from Manchester to Liverpool, and he sells them, I am not bound by the sale, but may bring an action of trover for them against the purchaser ; whereas, had I entrusted them to my factor for the same purpose, I should have been bound by the sale, that being a transaction within the ordinary scope of his business as factor

The case of *Whitehead v. Tuckett* (i) affords another very good illustration of the rule, that, although the express instructions are exceeded, yet, if what he does is within the usual scope of the business he is deputed to transact, the agent binds his principal by so doing. In that case, Sill & Co., who were brokers at Liverpool, were employed by the defendant, a wholesale grocer at Bristol, to buy and sell on his account great quantities of sugar. The greater part was bought on speculation for re-

(i) 15 East, 400. See *In re* L. J. (Ch.) 829.
Athenæum Life Ass. Co., 27

sale, and was re-sold at Liverpool: but some was occasionally sent to the defendant. Sill & Co. usually bought and paid for the sugar, and re-sold in their own names and received the price. They did not draw upon the defendant for the amount of each purchase, nor remit him the bill in payment of each sale; but there was a general running account between them. Sill & Co. never had a general authority to buy, but received directions in each instance; but sometimes, when the markets were low, had unlimited authority as to the quantity they were to buy, or the price they were to pay. In like manner, they had no general authority to sell, but received directions on each occasion. It was held that they might bind their principal by a re-sale of a particular parcel of sugar before purchased and paid for in their own names and lodged in their own warehouse, though such re-sale was for a price less than they were directed by their principals to sell for; for the Court considered that the general authority of the broker to sell being in respect of those who did not know their private instructions, *to be collected from their general dealing*, was not limited by such private instructions. "Much of the argument in this case," said Lord *Ellenborough*, "has turned upon the question whether Sill & Co. were invested with a general authority to sell the sugars. When that question is discussed, it may be material to consider the distinction between a particular and a general

authority ; the latter of which does not import an unqualified authority, but that which is derived from a multitude of instances ; whereas the former is confined to an individual instance. Now, in that sense of the term general authority, Sill & Co. were general agents, for they bought and sold in a multitude of instances in their own names, paid and received the money in their own names, and blended their accounts of receipts and payments without carrying each order to a separate account with the defendant ; and although there was a communication between them and the defendant as to the time and place of sale, yet the world was not privy to that communication, and had, therefore, no means of knowing that their general authority was controlled by the interposition of any check. There are, indeed, particular allusions as to the price and time of sale ; in one letter, the defendant writes to Sill & Co., that they may sell the whole of the St. Croix sugars (the matter in question) at sixty-eight or sixty-nine shillings on the best terms to safe men. If these expressions are to be construed into so many restrictions of the power of the brokers, it will follow that they were not only limited as to price, but also as to the terms of sale, which, according to the letter, were to be the best, and as to the purchasers who were to be safe men ; and if, in either of these respects, a contract made by them should fail, their principal would have a right to reject it. But if this c n what a

perilous predicament would the world stand in respect of their dealings with persons who may have secret communications with their principal." Where the real principal in a business, held out an agent as the ostensible principal, and carried it on under his management and in his name, he was held bound by all such acts and contracts as are incidental to the ordinary conduct of the business, and this obligation cannot be restricted by any private arrangement between them (*k*). In like manner, if an agent employed by the indorsees of a bill to get it discounted, warrant it to be a good bill, they are bound by his warranty (*l*). On the other hand, where the defendant, being about to purchase a mare, wrote to the plaintiff, "I will take the mare at twenty guineas, of course warranted;" and subsequently wrote again, "My son will be at the World's End (a public-house) on Monday, when he will take the mare and pay you: send anybody with a receipt and the money shall be paid, only say in the receipt sound and quiet in harness." The plaintiff said she is warranted sound, and quiet in double harness; and the mare, having been brought to the World's End on Monday, was taken away by the defendant's son without paying the price, and without a receipt or warranty. The writings between the parties not amounting to a complete contract, it was sought to show that the defendant

(*k*) *Edmunds v. Bushell*, 35 L. J. (Q. B.) 20. (*l*) *Fenn v. Harrison*, 4 T. R. 177.

was bound by the conduct of his son, as amounting to an acceptance in law. But it will clearly be perceived that the son was a particular agent, in which case his principal is not bound by what he does if he exceeds his authority. In this case, it is clear he has only a limited authority ; if a party contracts with another through his agent, he can only take such rights as the agent can give, and this is no hardship on the plaintiff, because he was distinctly informed that the son was authorised to receive the mare if a warranty were given that she was quiet in harness. This was not given, and, therefore, the son had no authority to accept the mare (*m*).

One more case will sufficiently illustrate the preceding reasoning (*n*). A bill of exchange was indorsed to the plaintiffs by a person who professed, in the form of indorsement, to act by procuration of the Newcastle Banking Company. It was held, that this form of indorsement was a notice to the indorsee that the party accepting was an agent, and imposed, therefore, upon the indorsee the duty of ascertaining that he was acting within the terms of his authority. "Any house," said *Coltman, J.*, "may allow a clerk to indorse bills of exchange in

(*m*) *Jordan v. Norton*, 4 *Smith v. M'Guire*, 27 L. J. M. & W. 155. (Ex.) 465 ; 3 H. & N. 554 ;

(*n*) *Alexander v. Mackenzie, P. O. of the Newcastle Banking Co.*, 6 C. B. 766 ; *Baines v. Ewing*, 35 L. J. (Ex.) 194.

the name and on account of the firm, and so give currency to them, notwithstanding any secret limitation of his authority. If this Banking Company had been in the habit of allowing their manager to indorse bills on their behalf, that would have imported a general authority, and the public would not have been bound to inquire into the circumstances, or the precise extent of such authority. They have not, however, done so here. But in every instance, the indorsement by the form of it bears an intimation to the public that the manager acts under a special authority : and therefore the persons into whose hands the bill might come were bound to see that the authority was properly pursued." *Bayley, J.*, says in *Attwood v. Munnings* (o), "This was an action upon an acceptance importing to be by procuration ; and therefore any person taking the bill would know that he had not the security of the acceptor's signature, but of the party professing to act in pursuance of an authority from him. A person taking such a bill ought to exercise due caution ; for he must take it upon the credit of the party who assumes the authority to accept, and it would be only reasonable prudence to require the production of that authority." And *Holroyd, J.*, adds, "The word procuration gave due notice to the plaintiffs, and they were bound to ascertain, before they took the bill, that

(o) 7 B. & C. 283.

the acceptance was agreeable to the authority given."

Now the reason for this (which you have probably extracted from the examples given) is very clear and simple: it is, that the public may not be deceived. If strangers see A. selling my goods day after day, month after month, and see me recognising the transactions, and receiving payment on that understanding, they may naturally enough suppose that I have given him a general authority to sell, and that they may safely deal with him on my account; and it would be hard indeed if I were allowed to turn round upon them and say, "True, he has a general authority, but I had revoked it in this particular instance." But, in the case of a particular agent, it is otherwise; for, as he is employed on one particular occasion only, there are no previous acts done by him for his principal, or recognitions of them by the principal, which can have a tendency to mislead any one. And there is no hardship in saying to the person who deals with him, "You must satisfy yourself that he is my agent at all, and when you do so you may as well satisfy yourself for what purposes he is my agent, and how far his authority extends."

Reason why a general agent binds his principal and a particular agent does not.

Such then is the distinction between a particular and a general agent; and, with regard to the latter, there is, for the further protection of the public, this further rule, *that the authority of a general agent is, as far as the public are concerned, mea-*

Further rule as to general agent.

sured by the extent of his usual employment. This is also a rule of common sense as well as law ; for what I see a man continually doing with the approbation of another, I may fairly conclude he has a general authority to do. I have not, it is true, seen his instructions, but I am justified in believing that he acts according to them when I see that his principal does not signify disapprobation of his proceedings ; and therefore the rule is, that where a man permits another to act generally for him in any line of business, he is bound by contracts made by that other in that line of business ; although, in truth and in fact, the person so acting may have a limited authority, or even no authority at all. This is laid down by Lord *Holt*, in homely, but forcible language, in Shower 95, where it is thus reported :—

Lord *Holt's*
doctrine.

“*Memorandum.*—Upon evidence in an assumpsit for wares sold, it was held by *Holt*, C. J., that if a man send his servant with ready money to buy meat or other goods, and the servant buys upon credit, the master is not chargeable. But if the servant usually buy upon tick, and the servant buy some things without the master's order, yet, if the master were trusted by the trader, the master is chargeable.”

There is a case of *Rusby v. Scarlett* (*p*), where the plaintiff was a cornchandler, who sued the

defendant for the price of hay and straw sold for the use of the defendant's horses. He had delivered it at the defendant's stables, and also bills of parcels, but had never seen the defendant or received any order from him, or any payment whatever directly from him. The defendant, a gentleman, had given his coachman money to pay the bills, which he had embezzled. The defendant kept a book with his coachman, in which were entered the articles procured by him, and money from time to time advanced to him ; but the money was not advanced for any particular articles, but generally. Lord *Ellenborough* told the jury that, if the servant was always in cash beforehand to pay for the goods, the master is not liable, as he never authorised him to pledge his credit. But, if the servant was not so in cash, he gave him a right to take up the goods on credit : and I think he would be liable, as the servant has not paid the plaintiff, though he might have received the money from the defendant his master. Upon the law thus laid down, the jury found a verdict for the plaintiff. "Suppose," said Lord *Denman*, C. J., in another case, "a landed proprietor had to send his steward habitually to the neighbouring fairs and markets to make sales and purchases for him in matters connected with the management of his estate, and that the steward makes all these contracts in his own name, but that he is universally known to have no land of his own, and to be acting solely for

his employer, by his direction and on his credit. Could his intention to make himself the owner of articles bought on one particular occasion in the course of the same dealing, deprive the vendor of his recourse against the master? Clearly not." In this instance every one would naturally suppose that the proprietor who authorised him to purchase in numerous cases, authorised him to purchase in that case also, in which he appropriated the thing purchased to himself, and cannot in common reason and justice be allowed to say to a person dealing innocently, that he did not authorise him in that instance (*q*). In the case (*r*) from which these observations are taken, the defendant, who was a merchant at St. Petersburg, had for a long time carried on business in London through one Higginbotham, in all the transactions of which business Higginbotham always used his own name, but was universally known to represent the defendant in them. He had himself neither capital nor credit. The defendant put an end to the agency; and afterwards Higginbotham made the contract (a sale of tallow) on which the action was brought, in all respects as if it had been in the defendant's business, in his own name as usual, and notwithstanding the termination of his agency; and the defendant was quite ignorant of the transaction. These were substantially the facts in the case. The defendant

(*q*) *Trueman v. Loder*, 11 A. & E. 593. (*r*) *Id.* 589.

was held bound to deliver the tallow. A motion for a new trial, on the ground that the sale was made by Higginbotham on his own account, was refused, on the ground that he was trading in his own name as the defendant's agent, with the defendant's full knowledge and authority ; and that till the defendant gave notice to the world that he revoked Higginbotham's power to act for him, all persons had a right to hold him to the contracts made by Higginbotham. In a word, said the Court, it was considered that the defendant was carrying on his business in the name of Higginbotham.

In accordance with the same rule, where a broker in London, engaged in the hemp trade, purchased for the plaintiff, a merchant at Hull, a parcel of hemp then lying at a wharf in the vendor's name, and the hemp was, by the plaintiff's desire, transferred in the wharfinger's books from the vendor's name to the broker's, and paid for by the plaintiff, the broker having contracted for the sale of hemp on his own account, and having none of his own to deliver, transferred the defendant's hemp to the purchaser and received the money. In this case the question was, whether the broker had authority to sell—it is clear that, as between himself and the plaintiff, his principal, he had it not ; and the only question was, whether, by permitting him to act as he had done in the purchase and transfer of the hemp, he was bound by his contract with respect to

it, made with a person who knew nothing of his real authority. The Court considered that the broker in this case was a general seller of hemp; that the hemp in question was left in the custody of the wharfinger in the broker's name; and that no stranger could suppose that it would be so left in the broker's name, but in order that the broker might dispose of it in his ordinary business as a broker: and they determined, that, the broker having sold the hemp, the principal was bound (s).

Principal
bound by
contract of his
agent made
according to
usage.

There is a series of recent instances, showing, that where a man appoints another to act for him in any line of business, he is bound by contracts made by him according to usage therein, which instances, although they consist of disputes between the principal and agent, and not like those we have been considering between the principal and the party with whom the agent has contracted, throw a great deal of light upon the obligation of the principal derived from the ordinary mode of transacting business, and in that point of view it will be useful to insert them here. The first of these instances is that of *Sutton v. Tatham* (t), where a person employed a broker to sell 250 shares in the South Australian Company; he was in an error as to the number; he meant to say 50 shares, and

(s) *Pickering v. Busk*, 15 (C. P.) 298; *Chapman v. East*, 38. *Shepherd* 36 L. J. (C. P.) 11;

(t) 10 A. & E. 27. See *Biederman v. Stone*, 36 L. J. *Heyworth v. Knight*, 33 L. J. (C. P.) 198.

in reality he had no more. The broker contracted with another broker on the Stock Exchange for the sale. The shareholder on the next day informed his broker of the mistake, and, finding the bargain could not be made void, requested him to do the best he could. By the rules of the Stock Exchange, in sales of this description, if the vendor is not prepared to complete his contract, the purchaser buys the requisite number of shares, and the vendor's broker is bound to make up the loss, if any, resulting from a difference in prices; the vendor being unable to complete his contract, and the purchaser having bought the requisite number of shares at a loss, the broker paid the difference, and was held by the Court of Queen's Bench entitled to recover that difference from his principal the shareholder. "For," said Mr. Justice *Littledale*, "a person who employs a broker must be supposed to give him authority to act as other brokers do. It does not matter whether or not he himself is acquainted with the rules by which brokers are governed." "I consider it to be clear law," said Mr. Baron *Parke*, in the subsequent case of *Bayliffe v. Butterworth* (u), "that if there is at a particular place an established usage in the manner of dealing and making contracts, a person who is employed to deal or make a contract there, has an implied authority to act in the usual way; and if

(u) 1 Exch. 428.

it be the usage that he should make the contract in his own name, he has authority to do so. It appears to me, that a person who authorises another to contract for him, authorises him to make that contract in the usual way." Thus it has been held, that one who employs a broker to buy railway shares for him, authorises him by that employment to do all that is needful to complete the bargain (x) ; and, therefore, where the defendant employed a broker and member of the Stock Exchange to buy some shares for him in the Vale of Neath Railway at 30s. discount, and at the time of the purchase a call had been made but was not payable, and the seller of the shares, in order to enable him to transfer them, paid the call, which the defendant refused to allow ; and the broker, being responsible by the rules of the Exchange for the completion of the contract, paid it ; he was allowed to recover the money so paid from the purchaser of the shares. The meaning of this contract clearly was, that the purchaser should become the owner of the shares upon payment of all such sums which the prior holders might have paid or become liable to pay in respect of them, less 30s. The authority, therefore, given to the plaintiff enabled him to buy the shares, and to incur a liability to pay all that had been paid upon them and that they then stood charged with, less 30s.

(x) *Bayley v. Wilkins*, 7 C. B. 886.

In like manner, the power of the master of a ship to bind his owners being but a branch of the general law of agency, it is clear that when a master contracts as such in a foreign port to carry goods for a foreigner, his authority to bind his owner is that conferred by the law of the country to which his ship belongs; and the flag of his ship is notice to all the world that his implied authority is limited by the law of that flag (*y*). Where a defendant carried on the business of horsedealer, and S., who assisted him in his business, and was also himself a horsedealer, sold for him a horse to the plaintiff, and warranted him to be sound, it was held that, it being within the scope of a horse-dealer's business to give a warranty whenever the giving of a warranty may form part of the transaction, no evidence was admissible to show that the defendant forbade S. to warrant (*z*).

Of course the principal would not be bound by any rule or custom of trade made after the transaction was completed, however it might bind the agent (*a*); and it will appear equally clear that if he deviates from the course usual in the line of business in which he is employed, he not only has no authority in fact, but does not seem to have any, and, consequently, cannot bind his principal thereby. Thus, although the master of a ship can

(*y*) *Lloyd v. Guibert*, 33 L. J. (C. P.) 42.
 L. J. (Q. B.) 241. (*a*) *Westropp v. Solomon*, 8
 (*z*) *Howard v. Sheward*, 36 C. B. 345.

bind the owners by a bill of lading for goods received on board the ship, a bill of lading, although in the usual terms given by the master in an instance where goods had never been received on board, does not bind the owners even in the hands of an assignee. All persons taking a bill of lading by indorsement or otherwise have notice that the master's authority is limited to signing bills of lading for goods received on board, and must themselves bear the consequences of the master's falsehood (b).

Implied
agency.

It has no doubt been observed in the examples just given, that in some of them the extent of the agent's authority is expressly prescribed, in some partly expressed and partly not expressed, and in others altogether implied. It is implied from the position or capacity in which a person acts. Of this description is the agency of factors, brokers, of partners, wives, and servants, all of whom have an implied or constructive authority to bind those for whom they act or are held to act, as we shall presently see more at large. The usages of trade form material points in determining the authority of an agent; and the custom of an individual as to the general mode and scope of his dealings with tradesmen, would, as we have seen, limit the implied au-

(b) *Grant v. Norway*, 20 Ex. 330; *Coleman v. Riches*, L. J. (C. P.) 98; 10 C. B. 24 L. J. (C. P.) 125; 16 C. B. 665, S. C. See *Hubbersly v. Ward*, 22 L. J. (Ex.) 113; 8

thority of his servants to bind him by their orders. Wherever acts are done inconsistently with express directions or with the customary transactions from which agency may be implied, there is an excess of authority, and the principal is not bound. In *Flemyng v. Hector* (c), it was held, on similar grounds, that where there is a managing committee of a club who choose to deal on credit instead of for ready money payments, which they were alone authorised by the members to do, the members are not bound by such contracts.

Many cases also occur where there is no such constructive or express authority at the time of the contract, but where it has been supplied by the subsequent assent or adoption of the principal, in which case his liability depends upon the same general reason as before. The subsequent ratification is equivalent to a prior command, and the great maxim of agency, "*Qui facit per alium facit per se*," has a retrospective effect. Thus, Pollard, having sent a quantity of goods for sale to Fernando Po, died intestate. After his death the defendant purchased the goods from the agent of the intestate, who sold them for the benefit of the estate. At the time of sale no administration to the intestate had been granted. Subsequently the plaintiff took out letters of administration. The Court, after first laying it down that the title of an adminis-

Ratified
agency.

(c) 2 M. & W. 172. See J. (C. P.) 194 ; 2 C. B. (N. Cockerell v. Aucompte, 26 L. S.) 440.

trator relates back to the death of the intestate, decided that the plaintiff had, by suing, ratified the sale by the agent, and that it was no objection that he was unknown to the agent at the time of sale (*d*). It is almost needless to say, that such a ratification may be inferred from the conduct of the principal, as well as it may be expressed by him in words ; for, as his appointment and authority may be inferred from the principal's conduct, as we have seen it may, it would be very inconsistent if his approval of what has actually been done by the agent could not also be inferred from conduct. But, as the question is, whether the principal did or did not approve of the transaction to which it is endeavoured to make him a party through the agency of another, it is held that the former cannot ratify a part of the transaction and repudiate the rest, but must adopt the whole or none (*e*). But, where a person at the time of doing an act does not profess to be therein acting as an agent, there is nothing, strictly speaking, to ratify ; and another person, however interested, cannot afterwards, by adopting the act, make the former his agent, and thereby incur any liability or take any benefit under the unauthorised act. This is a rule of con-

(*d*) *Foster v. Bates*, 12 M. 780.
 & W. 226 ; *Lewis v. Read*, 13 M. & W. 834 ; *Robinson v. Gleadow*, 2 N. C. 156 ; *Free-*
man v. Bosher, 13 Q. B. (e) *Wilson v. Poulter*, 2 Str. 859 ; *Brewer v. Sparrow*, 7 B. & C. 310.

siderable importance, and is fully explained in the case of *Wilson v. Tumman* (*f*).

But all this is subject to the observation, that the person who contracts with the agent has not *notice* of the limitation of his authority. It is very right that a stranger who sees an agent permitted to contract generally for his principal in this or that business should be safe in dealing with him, on the assumption that he has authority. But if he *knows* that he has no authority, in that case to hold the principal bound by a contract made contrary to the agent's real instructions, would be to give effect to a fraud; and accordingly, wherever the person who contracts with an agent *knows* that that agent's authority is limited, and nevertheless contracts with him beyond those limits, he does so at his peril, for the principal is not bound (*g*). And on this account it is wise and usual for persons who have been in the habit of employing a general agent, and are desirous of discontinuing him, to give notice to the world of their intention in the Gazette, and to those persons with whom they are in the habit of dealing, by circulars (*h*).

Notice of
limited
authority of
agent.

(*f*) 6 M. & Gr. 236; 11 A. & E. 589.

Anon., Godbolt, 109.

(*h*) See Smith's Merc. Law,

(*g*) See *Trueman v. Loder*, 6th ed. 158.

LECTURE X.

PRINCIPAL AND AGENT.—THEIR RESPECTIVE LIABILITIES.—AGENCY OF BROKERS, FACTORS, PARTNERS, WIVES.—RECAPITULATION.—REMEDIES BY ACTION.—STATUTES OF LIMITATION.

PURSUING the consideration of the points arising upon contracts made through the medium of agents, and having disposed of most of those which relate to the liability of the principal upon them, the next in order is that which regards his power to take advantage of them. Now, where the agent (a), when he makes the contract, states who his principal is, and states that he is contracting on the behalf of that principal; or where (though there may be no express statement to that effect) the circumstances of the transaction can be shown to have been so completely within the knowledge of the parties to it that there can be no doubt that it was understood at the time that the person who actually made the contract made it as an agent, and intended to make it on behalf of his principal; in such cases there can of course be no doubt of the principal's right to take advantage of it, and enforce it to the fullest extent. It is, in truth, as

Where the principal is known.

(a) *Seignior v. Wolmer*, Godb. 360.

if he had put his own hand to it. In such cases, therefore, there can be no difficulty. But the cases in which difficulties arise, are those in which the agent, being really only the substitute for another, nevertheless contracts in his own name as if he were himself the principal. In the words of *Blackburn, J.*, "An agent may and often does make himself personally a party to the contract, if the form of the contract be such as to amount to saying, 'Although I am agent only, nevertheless I contract for myself.' And although the principal may in some cases take advantage of such a contract, the agent, being the contracting party, is clearly liable, and can, therefore, sue upon it (b). Now, here the plaintiff says, 'I, as auctioneer, let land, and I contract that on the price agreed being paid to me, the person paying the price shall have the enjoyment of the land.'" In this instance, an agent known to be such was held entitled to sue upon the contract in his own name (c).

Now, in such a case, the principal may adopt and enforce the contract (d), but his right to do so is subject to a qualification which has been dictated by common sense and public convenience, namely, that, on declaring himself, he stands in the place of the agent who made it; so that the other contracting

Where the agent contracts as principal.

(b) *Higgins v. Senior*, 8 *Millington*, 1 H. Bl. 81. M. & W. 834. (d) *Cooke v. Seeley*, 17 L. (c) *Fisher v. Marsh*, 34 L. J. (Ex.) 286; 2 Ex. 746, J. (Q. B.) 177; *Williams v. S. C.*

party enjoys the same rights against him which he would have enjoyed against the agent who made it, had that agent really been the principal. For instance, if I buy a parcel of goods from A., who sells them to me in his own name, though he is really only the factor of B., whose property the goods are, B. may, if he think proper, declare himself the principal, and require me to pay the price to him; but if the factor owed me money which I could have set off against the price had the factor sued me for it, I have the right of setting it off against B., in like manner as I might have done against the factor. And the good sense and justice of this is obvious; for it may be exceedingly inconvenient, indeed ruinous to me, to pay in hard cash; and my knowledge that I should have this set-off may have been my only inducement to buy; and if I were deprived of it, I should be led into a trap—induced to purchase upon one ground, and forced to pay upon a different one.

The general rule, that a principal may declare himself, and take advantage of his agent's contract made without naming him, and this qualification of it (to prevent the injustice of which it might otherwise be made the instrument), are both very clearly laid down in the judgment in *Sims v. Bond* (e):—“It is a well-established rule of law,” said the L. C. Justice, delivering the judgment of the Court in

(e) 5 B. & Ad. 393; *Ramazzotti v. Bourring*, 29 L. J. (Ch.) 30.

that case, "that, where a contract *not under seal* is made by an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it—the defendant, in the latter case, being entitled to be placed in the same situation at the time of the disclosure as if the agent had been the contracting party." This rule is most frequently acted upon in sales by factors, agents, or partners, in which cases either the nominal or the real contractor may sue, but it may be equally applied to other cases. Thus, in *George v. Clagett* (*f*), the case was this: the plaintiff, a clothier, employed Rich and Heapy as his factors, who, besides, acting as factors, bought and sold great quantities of woollen cloths on their own account, and carried on all their business at one warehouse. Rich and Heapy became largely indebted to the defendants, who afterwards purchased woollen cloths of them, amounting to more than their debt, and on being sued by the plaintiff for the cloth so bought of them, the defendants were considered to be entitled to set off the debt of Rich and Heapy to them. By the statute of set-off (*g*), said *Holroyd*, J., in the very similar case of *Carr v. Hinchliff* (*h*), where there are mutual debts between a plaintiff and a defendant, the latter may set off the debt due to him against that which is

(*f*) 7 T. R. 359; *Isberg v. Bowden*, 22 L. J. (Ex.) 322; 8 Ex. 852. (*g*) 2 Geo. II., c. 22. (*h*) 4 B. & C. 553.

claimed. The statute gives him a right to say, that the debt claimed is paid by that which is due to him, and that it operates as an extinguishment of the debt. And now, by analogy to the defence given by the statute, a defendant is also entitled to say that his debt is extinguished by another debt due to him from any person who may be identified with the plaintiff. Even where the defendants were aware that they were dealing with an agent, but that agent had a right to sell in order to pay himself advances, and the purchaser, in buying the goods in question, *bond fide* believed that the agent sold them for that purpose, it was decided that the purchaser was entitled to set off the payments made by him to the factor. This was the case of *Warner v. M'Kay* (i), where the Court treated the question as being, whether the defendant had a right to consider that he had paid the factors for those goods. The only doubt arose from the defendant being apprised that the goods belonged to the plaintiffs. But as the factors were accustomed to sell in their own names, and did sell these goods in their own names, and the jury having found that the defendant believed that they had authority to sell, and was not bound to inquire further, the Court supported a verdict for the defendant. Of course, if the purchaser knew all along that he was dealing with an agent, he cannot set off, in an action by the principal for the price of goods

(i) 1 M. & W. 591.

bought by him of the agent, a debt due from the agent to himself; for that would be treating the agent and the principal as one, where they are not identified, and creating instead of preventing the injustice which the law thus seeks, by allowing a set-off of this kind, to prevent (*k*). The real grounds on which the before-mentioned cases have been decided, were stated by the Court of Exchequer in *Isberg v. Bowden* (*l*), to be "that when a principal permits an agent to sell as apparent principal, and afterwards intervenes, the buyer is entitled to be placed in the same situation at the time of the disclosure of the real principal as if the agent had been the real contracting party, and is entitled to the same defence, whether it be by common law or by statute, by payment or by set-off, as he was entitled to at that time against the agent, the apparent principal." It seems sufficiently connected with these propositions, to add here, that where the principal does not intervene, but allows the agent to sue in his own name, two consequences follow: 1st, that the defendant may avail himself of all defences which would be good against the agent, who is by the supposition the plaintiff on the record (*m*); 2nd, that he may avail himself of those

(*k*) *Fish v. Kempton*, 7 C. B. 687; *Dresser v. Norwood*, 34 L. J. (C. P.) 48, Ex. Ch.; *Semenza v. Brinsley*, 34 L. J. (C. P.) 161.

(*l*) 8 Ex. 852.

(*m*) *Gibson v. Winter*, 5 B. & Ad. 96; *Wilkinson v. Lindo*, 7 M. & W. 81.

which would be good against the principal for whose sole use the action has been brought (*n*).

Right of
option
whether to
charge prin-
cipal or agent.

Before leaving this subject, I will say one word with regard to the situation of an agent who contracts in the manner I have just mentioned, without naming his principal. It is settled that, in such a case, the other contracting party may, when he discovers the true state of facts, elect to charge either him or his principal, one or the other only, but (*o*) whichever he may think most for his advantage. Thus, in *Paterson v. Gandasequi* (*p*), the defendant, who was a Spanish merchant, employed Larrazabal to purchase for him various assortments of goods for the foreign market, for which he was to charge a commission of 2 per cent. Larrazabal applied to the plaintiffs and requested them to send to his counting-house an assortment of the goods, with terms and prices. Paterson brought patterns of the goods to the counting-house, with the terms and prices, when Gandasequi was present. The samples were handed to him. He inspected them, selected such as he required, and the terms and

(*n*) *May v. Taylor*, 6 M. & Gr. 261; *Meggison v. Harper*, 2 C. & M. 322. 24 L. J. (Ex.) 76; 10 Exch. 739; *Smethurst v. Mitchell*, 28 L. J. (Q. B.) 241; *Risbourg v. Bruckner*, 27 L. J. (C. P.) 90; 3 C. B. (N. S.) 812; *Greene v. Koptree*, 25 L. J. (C. P.) 297; 18 C. B. 549.

(*o*) *Priestley v. Fernie*, 34 L. J. (Ex.) 172.

(*p*) 15 East, 62; *Waring v. Favenck*, 1 Camp. 85; *Kymer v. Suwercropp*, 1 Camp. 109; *Heald v. Kenworthy*,

prices were shown to him, and left there; subsequently Larrazabal, in pursuance of directions from Gandasequi, ordered the goods from Paterson. He sold the goods on the credit of Larrazabal, made out the invoices in his name, and sent them to him, and he debited the amount to Gandasequi. The law, said Lord *Ellenborough*, has been settled by a variety of cases, that an unknown principal, when discovered, is liable on the contracts which his agent makes for him. On the other hand, "if the agent contract without naming any principal, he is himself the person *prima facie* responsible; and though the other party may, in most cases, elect to charge the employer on discovering him, yet he need not do so, but may, if he please, continue to look to the agent (*q*). He may also do the same where the agent, at the time of making the contract, says that he has a principal, but declines to say who that principal is (*r*). It is important to bear in mind the rule that this election, when once made, is binding. This is the main point which is illustrated by the case of *Paterson v. Gandasequi*, already cited, when, under the facts before described, the Court laid down, that if the seller of goods, knowing, at the time of making the contract of sale,

(*q*) *Morgan v. Corder*, Paley *supra*.

Prin. and Agent, 3rd edit., p. 372; Smith's Merc. Law, by Dowdeswell, 6th edit., p. 168, &c.; *Paterson v. Gandasequi*,

(*r*) *Thomson v. Davenport*, 9 B. & C. 78; *Cooke v. Wilson*, 26 L. J. (C. P.) 15; 1 C. B. (N. S.) 153.

that the buyer, although dealing with him in his own name, is in reality the agent of another, elect to give credit to the agent, he cannot afterwards recover the value from the known principal. In the subsequent but almost contemporary case of *Addison v. Gandasequi* (s), the latter, who had acted towards the plaintiff in a similar manner to that described in noticing the case of *Paterson v. Gandasequi*, was held not to be liable, Addison having, with full knowledge of the facts, debited Larrazabal in his books. In both these cases, the vendor had elected to look to the agent for payment, knowing, at the time of the contract, that another person was the principal, and also knowing who that principal was. In the more recent case of *Thomson v. Davenport*, one M'Keene having received an order from Davenport for the purchase of goods, ordered them from Thomson, the plaintiff, letting him know that they were for his employer, but not mentioning the name of any principal. The plaintiff named M'Keene as purchaser in the invoice of the goods: the Court considered that the plaintiff, having treated M'Keene as his debtor, whilst ignorant of the real purchaser, was not bound by that election, but might afterwards sue the principal for the price. "I take it to be a general rule," said Lord Tenterden, "that if a person sells goods, supposing at the time of the contract that he is dealing

(s) 4 Taunt. 573.

with the principal, but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the meantime have debited the agent with it, he may afterwards recover the amount from the real principal, subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal. On the other hand, if, at the time of the sale, the seller knows not only that the person who is nominally dealing with him is not the principal, but agent, and also knows who the principal really is, and notwithstanding all that knowledge, deals with him, and him alone, then the seller cannot afterwards, on the failure of the agent, turn round and charge the principal, having once made his election at the time when he had the power of choosing between the one and the other. The present is a middle case ; at the time of the dealing for the goods, the plaintiffs were informed that M'Keene, who came to buy the goods, was dealing for another, that is, that he was an agent ; but they were not informed who the principal was. They had not, therefore, at that time, the means of making their election. It is true, that they might perhaps have obtained those means if they had made further inquiry ; but they made no further inquiry. Not knowing who the principal really was, they had not the power at that instant of making their election ; that being so, it

seems to me that this middle case falls, in substance and effect, within the first proposition that I have mentioned, the case of a person not known to be an agent, and not within the second, where the buyer is not merely known to be an agent, but the name of his principal is also known. There may be another case, and that is, where a British merchant is buying for a foreigner. According to the universal understanding of merchants and of all persons in trade, the credit is then considered to be given to the British buyer, and not to the foreigner" (*t*), although, of course, a contract may be made by the agent so as to charge the foreigner and not himself (*u*). Indeed, it hardly requires mentioning, that the question, which is liable—the foreign principal or the English agent—is one of intention (*x*), in which the fact, that the principal debtor is a foreigner residing abroad, renders it highly improbable that the credit should have been given to him (*y*).

Where the state of accounts would be altered.

But there is this qualification to the right of election, namely, that if the state of accounts between the agent and principal have been altered, so that the principal would be subjected to a loss by the

(*t*) See *Wilson v. Zulueta*, 19 L. J. (Q. B.) 49; 14 Q. B. 405, S. C. J. (Ch.) 297; *Deslandes v. Gregory*, 29 L. J. (Q. B.) 93; S. C. in Ex. Ch., 30 L. J. (Q. B.) 36.

(*u*) *Mahony v. Kekulé*, 23 L. J. (C. P.) 54; 14 C. B. 390, S. C. (*y*) *Lennard v. Robinson*, 24 L. J. (Q. B.) 275; 5 E. & B. 125.

(*x*) *Green v. Koptree*, 25 L.

other contracting party's election, the right of election is in such case lost. Suppose, for instance, I employ A. to purchase goods, and he purchases them from B. in his own name ; now B., when he discovers me to be the real principal, may elect whether he will treat me or my agent A. as his debtor ; but if, in the meantime, I have paid A., he will lose that right, since otherwise I should have to pay the price twice over. Still, this qualification is itself subject to a minor one, namely, that the principal cannot, by prematurely and improperly settling with his agent, deprive the other contracting party of his right of election. Suppose, for instance, as in the case I have just put, that I employ A. to purchase goods, not for ready money, but at three months' credit. A. purchases in his own name from B., B., before the three months have elapsed, discovers the true state of affairs, and elects to take me as his debtor. I should not be allowed to say, in this case, "You are too late ; I have settled with A., my agent." The answer would be, "You had no occasion to do so pending the time of credit ; and you cannot, by doing so, deprive B. of his right to elect you as his debtor" (z).

In the case of *Kymer v. Suwercropp*, Lord *Ellenborough* said, "a person selling goods is not confined to the credit of a broker who buys them,

(z) *Thomson v. Davenport*, *Kenworthy*, 24 L. J. (Ex.) supra ; and *Kymer v. Suwercropp*, 1 Camp. 109 ; *Heald v.* 76 ; 10 Exch. 739.

but may resort to the principal on whose account they are bought ; and he is no more affected by the state of accounts between the two than I should be were I to deliver goods to a man's servant pursuant to his order, by the consideration of whether the servant was indebted to the master, or the master to the servant. If he lets the day of payment go by, he may lead the principal into a supposition that he relies solely on the broker ; and if, in that case, the price of the goods has been paid to the broker on account of this deception, the principal shall be discharged. But, in this case, payment was demanded of the defendant on the several days it became due, and no reason was given him to believe that the broker alone was trusted. The defendant had received a great part of the goods ; the right of the vendors was entire, unless the defendant had paid the price to them, or to some person authorised by them to receive it. The broker had no such authority ; therefore the defendant is liable." In that case, as observed by the Court of Common Pleas, in the subsequent case of *Smyth v. Anderson* (a), Lord *Ellenborough* must be considered as having properly decided that the defendant had no right to set up a payment accepted by the brokers contrary to their duty, and not made by him in conformity with the obligation which the contract imposed upon him.

(a) 7 C. B. 39.

In the case of *Smyth v. Anderson* (b), just mentioned, Melville ordered of the plaintiffs certain goods, telling them they were for shipment to Bombay, pursuant to orders received. They were in fact ordered for Anderson, and were received by him; but Melville could not say whether, at the time of giving the order, the name of Anderson was mentioned. The invoices, however, sent afterwards, described the goods as "bought on account of Anderson, Bombay, per Melville, London, by Pender & Co., agents" (the plaintiffs). In payment for these goods, the plaintiffs drew bills upon Melville, which bills were dishonoured. Melville had a general account with Anderson, on which, at the time of his stopping payment, he was debtor to Anderson in a large amount. There was no evidence of any payment by him to Melville applicable to these goods in particular; but shortly after the shipment of them, Melville sent Anderson an account debiting him with the amount of the bills, and the latter had since, but before they became due, remitted to Melville an amount more than sufficient to cover them. "Melville," said *Maule*, J., "having become insolvent, Anderson is sued for the price, and the question is, whether it is fair and reasonable he should be so charged. The plaintiffs got what they considered an advantage, the security of Melville, and must be taken to have requested

(b) 18 L. J. (C. P.) 109; 7 C. B. 21, S. C.

that all might be done that was necessary and incident to that arrangement ; and, therefore, the remittance made by Anderson to provide for the bills, which was the natural and proper course to be taken by him, was substantially made with the cognizance and at the request of the plaintiffs ; can they then be permitted to call upon the defendant to pay the price of the goods over again ? The fact that the money was paid before the bills became due, does not prevent the defendant from availing himself of this defence. When all the parties are living in this country, and the agent has not accepted bills on account of the goods, so that the duty of putting him in funds by a previous remittance does not arise, if the principal pays the broker before the proper time has arrived, and without the privity of the seller, one can perceive the justice of not permitting the principal to set up such premature payment in answer to the seller's claim on him for the price."

Partners.

The law of agency has derived much illustration from many recent cases which have been decided upon partnership contracts, for "all questions between partners," as expressed by *Parke, B.*, in the case of *Beckham v. Drake (c)*, "are no more than illustrations of the same questions as between principal and agent." It is thought, therefore, that some leading principles of the law of contracts, as

it respects this species of agency, may be useful here, as further illustrating what has been said before, and also as giving some insight into that important head of law to which it directly pertains.

Partnership is the result of a contract whereby two or more persons agree to combine property or labour for the purpose of a common undertaking, and the acquisition of a common profit (*d*). One party may contribute all the money, or all the stock, or all the labour necessary for the purposes of the firm. But, in order to make people liable as partners to each other, it is necessary that there should be a community of profits (*e*), although one of them may stipulate to be indemnified against loss (*f*). This, however, respects their mutual claims, for, however they may stipulate with each other, all who take a share in the profits (*g*), and all who allow themselves to be described and held out as partners, are liable as such to those to whom they have so held themselves out (*h*). Supposing the parties to have become partners, the result is that each individual partner constitutes the others his agents for the purposes of entering into all con-

(*d*) Smith's Merc. Law, 6th edit., by Dowdeswell, p. 20. 617.

(*e*) *Hoare v. Daices*, 1 Dong. 371. (*g*) *Hoyhoe v. Burge*, 9 C. B. 431; 19 L. J. (C. P.) 243.

(*f*) *Bond v. Pittard*, 3 M. & W. 357; *Hickman v. Cox*, 25 L. J. (C. P.) 277; 18 C. B. 617. (*h*) *Dickenson v. Valpy*, 10 B. & C. 140; *Fox v. Clifton*, 6 Bing. 793.

tracts for him within the scope of the partnership concern, and, consequently, that he is liable to the performance of all such contracts in the same manner as if entered into personally by himself (i). It follows at once, that in general no new member can be introduced into the partnership without the consent of all the partners (k); for to do so would be for an agent to appoint an agent in the matter of the agency, which, as we have seen, cannot in general be done. It follows, also, from the same principle, that where there is no specific authority, the individual members will be liable upon the partnership contracts, or not, according as the contract is in the ordinary course of the partnership business or not. Thus, in *Adams v. Bankart* (l), it was held, that one partner has no implied authority to bind his co-partner by a submission to arbitration, or by a guaranty (m), respecting the matters of the partnership: for it is clear that such a power does not arise out of the relation of partnership, and is not, therefore, to be inferred from it; and, where it is relied upon, it must, like every other authority, be proved either by express evidence, or by such circumstances as lead to the presumption of such an authority having been conferred. Thus, also, in *Hasleham v. Young* (n), where persons

(i) 6 Bing. 792; *Hawtayn v. Bourne*, 7 M. & W. 595.

(k) *M'Neill v. Reid*, 9 Bing. 68.

(l) 1 C. M. & R. 681.

(m) *Brettel v. Williams*, 4 Exch. 623.

(n) 5 Q. B. 833.

were in partnership as attorneys, and one of them gave an undertaking, that, in consideration that the plaintiff in an action would discharge the defendant in that action, who was in custody under an execution therein, they, the attorneys, would pay the plaintiffs the debt and costs on a certain day, and he signed it with the partnership name : but the Court considered it a very clear case that the guaranty was not given in the usual course of business, and no authority being shown, that the firm was not liable. There is nothing, however, to prevent the parties from confining the credit to an individual partner ; and it is a question for the jury whether this has or has not been done. Where there has been nothing to discharge a partner from his liability, or to rebut the presumption of authority to pledge his credit arising from the mere fact of his being a partner, he is clearly liable ; but where there are facts to show that it was the intent of the contracting parties to restrict the credit to one of several partners, the liability is limited by such intent. Cases of this description occur where the partner represents himself as the only person composing the firm. Thus, in *De Mautort v. Saunders* (o), Saunders (not the defendant) and Wiehe drew a bill at the Mauritius on Saunders Brothers (the defendants) in London, payable to Bougier, who indorsed it to the plaintiff, and the

(o) 1 B. & Ad. 398.

defendants accepted the bill. On being sued upon it they set up as a defence that they were in partnership with Wiehe & Saunders, and were liable jointly with them. The Court held, that the verdict, which was for the plaintiff, was proper, and observed, that it was for the jury to say whether the plaintiff, when he took the bill, had any reason to know that Wiehe & Saunders were partners in the house in London on which the bill was drawn. It was incumbent on the defendants to show that the plaintiff had trusted the other two; for, if a person contract with two other persons, knowing them alone in the transactions, he may sue them only. If, indeed, after the contract be made, he discover that they had a secret partner who had an interest in the contract, he is at liberty to sue that secret partner jointly with them, but he is not bound so to do. On the other hand, where an action was brought for the price of coals delivered to the defendant under the name of Bush & Co., it appeared that for some time before the coals were ordered the partnership consisted of Bush and the defendant, R. Smith; that, on Bush's death, before the coals were supplied, W. Smith became a partner with defendant, and so continued, but they carried on their trade under the old name of Bush & Co.; and that W. Smith had not ordered the coals: it was contended, that W. Smith should have been sued conjointly with the defendant. The Court decided that, the partnership having been fully

proved, the defendant would not be liable singly unless he led the plaintiff to believe that he alone constituted the firm of Bush & Co. (*p*). If a person contracting with another for goods, said Lord Abinger, C. B., delivers an invoice made out to a firm, and nothing is said as to the persons composing it, he takes his chance who are the partners in that firm. If, indeed, the party represents himself as the only person composing the firm, an action may be brought against him alone ; or if, on being asked who his partners are, he refused to give any information, that might be evidence for the jury to say whether he did not hold himself out as solely liable.

There is another case, so well worth attending to, that it will not be multiplying examples too much to adduce it here. Nesham agreed to sell the stock, machinery, &c., of a newspaper printing-office to Lowthin for £1500., to be paid, with interest, by yearly instalments in seven years, and guaranteed to him the clear yearly profit of £150. over and above the payment of principal and interest before mentioned ; and Lowthin agreed to pay all the surplus profits to Nesham, until they should amount to £500., if they should amount to so much during the seven years, in which event he should also pay, over and above the purchase-money, interest, and £500., the existing liabilities, which

(*p*) *Bonfield v. Smith*, 12 M. & W. 405.

were fixed between them at £250. Lowthin carried on the newspaper in his own name, and purchased, in his own name, from the plaintiff paper for the use of the concern, and used it therein, but the plaintiff never actually gave any credit to Nesham. Yet, the Court held that Nesham was liable because he shared the profits (*q*): and indeed it seems difficult to treat the case otherwise than as that of an unknown principal sued upon being discovered to be such. Another case is where one partner has authority from the others to make the contract in question on his own account only, and not on theirs. Thus, the plaintiff supplied paper to one Whitehead, a printer, and it was proved that there was an agreement between Whitehead, Ackerman, and Carleton, to bring out a periodical publication called the *Sporting Review*, in which Ackerman was to be publisher, Carleton editor, and Whitehead printer, and the latter was to supply the paper, and charge it to the account of the three who, after payment of all expenses, were to share the profits equally. No profits were made. The plaintiffs sued the three, and were nonsuited, and the Court considered that the question was did Ackerman and Carleton authorise Whitehead to purchase the paper on their account or his own.

(*q*) *Barry v. Nesham*, 3 C. B. 617; 27 L. J. (C. P.) 129; & B. 641; *Hickman v. Cox*, 3 C. B. (N. S.) 523, in Ex. 25 L. J. (C. P.) 277; 18 C. Ch.

He might, they said, have applied the paper to any other purpose than the Sporting Review (r). The result is, that the liability arising from the naked fact of partnership is *prima facie* the liability of all the partners, and may be rebutted by direct evidence that credit was not given to the partnership, but to an individual member of it (s). This doctrine is very strongly corroborated by one of the latest cases on the point, *Holcroft v. Hoggins* (t). The plaintiff had been engaged to write articles in the Newcastle Advertiser, by a person who, at the time of the contract, had become in fact the sole proprietor of the newspaper, and the two defendants were sought to be made liable, in consequence of their having suffered their names to remain as registered proprietors of the newspaper, in the declaration required to be filed by 6 & 7 Will. IV., c. 76, they having previously been proprietors of the newspaper, but having ceased to be so before the contract was entered into. It was adjudged that not only were the defendants not liable, but that the fact of their being co-proprietors was immaterial, though they had held themselves out as such, if it were shown that another partner contracted with the plaintiff in such a manner that

(r) *Wilson v. Whitehead*, Exch. Ch.; *Brett v. Beckwith*, 10 M. & W. 50. 26 L. J. (Ch.) 130.

(s) *Peacock v. Peacock*, 2 Camp. 45; *Beckham v. Knight*, 4 N. C. 243; 1 M. & Gr. 738, (t) 2 C. B. 488; 15 L. J. (C. P.) 129, S. C.

credit was given to him and not to them. And the Court thought that the evidence was, that the contract was made by the sole proprietor, upon his own sole responsibility, and not upon that of the defendants. It was true that, on the register at the stamp-office, they held themselves out as proprietors, and if it had been shown that the plaintiff was thereby induced to enter into the contract, they might have been liable.

Cause of
action must
be during
time of
partnership.

It must also be shown that the debt for which an action is brought accrued during the time the party sued was actually in partnership. He will be liable neither for contracts made before (*u*) nor after (*x*) he became a partner, provided he gives proper notice of his retirement (*y*).

Dormant
partners
equally bound
by express as
by implied
contracts.

It has been long held that dormant partners are equally liable with ostensible partners upon all contracts made for the firm during their partnership; on the principle, not perhaps very satisfactory, that the dormant partner, being entitled to all the profits of the contract made by the firm to which he belongs, ought also to share in the liability; and that having a right moreover to sue others on it (*z*),

(*u*) *Vere v. Ashby*, 10 B. & Esp. 248; *Williams v. Keats*, C. 288; *Battley v. Lewis*, 1 2 Stark. 290; *Dolman v. M. & Gr.* 155; *Beale v. Moul*, Orchard, 2 Car. & P. 104; 10 Q. B. 976; *Whitehead v. Moorsom v. Bell*, 2 Camp. Barron, 2 M. & Rob. 248. 616.

(*x*) *Heath v. Sanson*, 4 B. & Ad. 172.

(*z*) *Robson v. Drummond*, 2 B. & Ad. 308. See 28 & 29

(*y*) *Parkin v. Carruthers*, 3 Vict. c. 86.

he ought not to be protected from being sued on it by them : for "*Qui sentit commodum sentire debet et onus.*" It is therefore decided that, as an undisclosed principal may be liable as soon as he is discovered, subject to all the equities between the parties, so may an undisclosed partner. Neither is there any distinction between express or written contracts, and those which are implied or verbal. This was decided in the case of *Beckham v. Drake* (a).

Nominal partners are as liable as dormant ones, not because they are principals for whom others are agents, but on the ground that credit has been given to them, and it is just to the creditor that they should be responsible for the result of so holding themselves out to the world. Indeed, it would be highly prejudicial to commerce to allow a wealthy man by the loan of his name, to give other persons a factitious credit in the world, and then to refuse to satisfy creditors who had made their advances upon the faith of his apparent responsibility (b). But the claims for which a partner merely nominal is liable, must arise out of credit really given to the fact that he was a partner when the credit was given. The jury must be satisfied that the plaintiff *bond fide* believed that the partner sought to be charged was really such (c).

Nominal
partners.

(a) 9 M. & W. 79 ; 11 M. BL 235.

& W. 315, in Exch. Ch.

(c) *Dickenson v. Valpy*, 10

(b) *Waugh v. Carver*, 2 H. B. & C. 128 ; *Lake v. Duke*

Notice of the retirement of a partner.

A general notice is sufficient to discharge partners who retire from firms as regards the world at large ; but an express notice is requisite to discharge them as regards previous customers. This being done, the retiring partner is effectually discharged from all debts subsequently accruing ; nor can he be made liable by any unauthorised use of his name by his previous partners (*d*), though his liability, as well as his power to make admissions, or to release or sue for debts contracted during his partnership, of course remains.

Notice of dissolution by dormant partners.

In *Farrar v. Deflinne* (*e*), the defendant had been a dormant partner, but ceased to be so before the debts accrued for which the action was brought. The plaintiff had known of the partnership, but the dissolution not having been advertised, he had no knowledge of it. Mr. Justice *Cresswell* said, in summing up the case : " The law stands thus : if there had been a notorious partnership, but no notice had been given of the dissolution thereof, the defendant would have been liable. If there had been a general notice, that would have been sufficient for all but actual customers ; these, however, must have had some kind of actual notice. If the partnership had remained profoundly secret, the defendant could not have been affected by transactions which took place after he had retired ; but

of *Argyll*, 6 Q. B. 477 ; *Wood v. Duke of Argyll*, 6 M. & G. 928.

(*d*) *Abel v. Sutton*, 3 Esp. 108.

(*e*) 1 C. K. 589.

if the partnership had become known to any person or persons, he would be in the same situation *as to all such persons*, as if the existence of the partnership had been notorious."

Where bills are drawn by partners in trade, the general authority implied by the custom of merchants binds each partner; but not so where the partnership is not of a commercial nature, such as that of attorneys for instance, in which case it must be shown that the party accepting or drawing had special authority to do so, even where it is done in the name of the firm (*f*). Where one partner signs for the firm, being authorised to do so, and describes himself as signing for the firm, he is not separately liable, but the firm alone (*g*). If he accepts, professing to have authority which he has not, a bill addressed to the firm, he makes himself liable thereby (*h*).

Where one partner binds another by accepting bills.

It will be concluded from the nature of partnership authority, that partners are not liable for the fraudulent contracts of a co-partner, if they can prove the knowledge of the fraud by the plaintiff (*i*). Neither are they bound where an express

Fraudulent contracts.

Where express warning has been given.

(*f*) *Hedley v. Bainbridge*, 3 Q. B. 316; *Levy v. Pyne*, 1 Car. & M. 453.

(*g*) *Ex parte Buckley, In re Clarke*, 14 M. & W. 469, overruling *Hall v. Smith*, 1 B. & C. 407.

(*h*) *Owen v. Van Uster*, 10 C. B. 318; 20 L. J. (C. P.) 61, S. C.; *Nicholls v. Diamond*, 23 L. J. (Ex.) 1; 9 Ex. 154, S. C.

(*i*) *Musgrave v. Drake*, 5 Q. B. 185.

warning was given to the plaintiff by the partners sought to be charged.

Factors and
brokers.

There are two other classes of agents so commonly employed, and that upon business so important, that a few propositions of law respecting them will be useful; these are brokers and factors. Factors are entrusted with the possession of the property they are to dispose of; brokers are entrusted with the disposal, but not with the possession. The latter, by force of the stat. 6 Ann. c. 16, cannot practise in London without being admitted by the Mayor and Aldermen, when they take an oath and enter into a bond for the observance of certain regulations (*k*). We have seen that a person acting as a broker in London, without being duly qualified, cannot recover compensation (*l*). Brokerage relates to goods and money, and not to contracts for labour (*m*); therefore, a stockbroker is within the statute (*n*), but not a shipbroker (*o*), or an auctioneer (*p*), or one who procures and hires persons to work for another, in surveying lines of railway (*q*). Each stockbroker is bound to keep a

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| (<i>k</i>) <i>Kemble v. Atkins</i> , Holt N. P. 427; 6 Anne, c. 16; 57 Geo. 3, c. lx.; 10 Anne, c. 19, s. 121. | (<i>m</i>) <i>Milford v. Hughes</i> , 16 M. & W. 174. |
| (<i>l</i>) <i>Cope v. Rowlands</i> , 2 M. & W. 149; <i>Smith v. Lindo</i> , 27 L. J. (C. P.) 196; 4 C. B. N. S. 395; 5 C. B. N. S. 587, in Exch. Ch. | (<i>n</i>) <i>Clarke v. Powell</i> , 4 B. & Ad. 846. |
| | (<i>o</i>) <i>Gibbons v. Rule</i> , 4 Bing. 301. |
| | (<i>p</i>) <i>Wilkes v. Ellis</i> , 2 H. Bl. 555. |
| | (<i>q</i>) <i>Milford v. Hughes</i> , <i>supra</i> . |

book called a broker's book, and to enter in it all contracts for stock, with dates and names, and to produce it when required (*r*). All other brokers keep a book and make similar entries in it, which in London they are required to do by their bond (*s*), and this entry, signed by the broker who has negotiated the sale and purchase of goods, constitutes the binding contract between the parties (*t*), whose agent for making it the broker is (*u*). But in practice the bought and sold notes, which are memoranda of the purchase and sale, signed by the broker, and sent to the parties, are considered as constituting the complete proof of the contract. A remarkable variation from the usual course of business obtains in the case of insurance brokers. By these persons subscriptions to a policy of assurance are almost always procured; to them the underwriters look for the premium of insurance, and to them the assured pay the premiums. This is clearly explained in the following extract from the judgment of *Bayley, J.*, in *Power v. Butcher* (*x*):—Now, according to the ordinary course of trade between the assured, the broker, and the underwriter, the assured do not, in the first instance, pay the premium to the broker, nor does the latter pay

(*r*) 7 Geo. 2,

(*s*) *Kemble v.*

(*t*) *Sivewright*

20 L. J. (Q. B.)

B. 104, S. C.;

Dale, 27 L. J. (Q.

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it to the underwriter. But, as between the assured and the underwriter, the premiums are considered as paid. The underwriter, to whom in most instances the assured are unknown, looks to the broker for payment, and he to the assured. The latter pay the premiums to the broker only, and he is a middle man between the assured and the underwriter; but he is not solely agent—he is a principal to receive the money from the assured and to pay it to the underwriter.

As to the mode in which, in the event of a loss, the payment is made to the assured, the brokers usually settle and adjust the loss, and receive the payment. It is a frequent custom to make settlements in account, there being, as you have seen, an account between the broker and the underwriter; and it is clear that if the assured have known, or ought, in the common course of things, to have known of such a custom, they will be bound by it although money has not been actually paid by the underwriter. This was decided in *Stewart v. Aberdeen* (y); but the Court added, in delivering its judgment, “It must not be considered, that, by this decision, the Court means to overrule any case deciding that where a principal employs an agent to receive money and pay it over to him, the agent does not, thereby, acquire any authority to pay a demand of his own upon the debtor, by a set-off in

(y) 4 M. & W. 211.

account with him (z). But the Court is of opinion that, where an insurance broker or other mercantile agent has been employed to receive money for another, in the general course of his business, and where the known general course of business is for the agent to keep a running account with the principal, and to credit him with sums which he may have received, by credits in account with the debtors with whom he also keeps running accounts, and not merely with moneys actually received, the rule laid down in those cases cannot properly be applied; but it must be understood that where an account is *bonâ fide* settled according to that known usage, the original debtor is discharged, and the agent becomes the debtor, according to the meaning and intention and with the authority of the principal." But the necessity of this knowledge in the principal in order to render such a settlement in account equivalent to a settlement according to the express authority of the principal, has been very strongly illustrated in a recent case, in which even a usage at Lloyds' to this effect was held insufficient to give authority to the agent where there was proof that the principal was ignorant of it (a).

(z)
25 L. ,
239 ;
Union
(Ex.)
Ex. Cl

ison, 27 L. J. (Bptey.)
eting v. Pearce, 29 L.
) 265 ; Perry v. Hall,
. Ch. 677 ; Catteral v.
35 L. J. (C. P.) 161.
reeting v. Pearce, supra ;

These few propositions, it is hoped, will enable you more readily to understand those cases of the law of principal and agent, where the latter is a broker, and where the general rules do not, therefore, seem directly applicable without reference to these peculiarities.

Factors.

As factors are entrusted with the possession of goods usually for the purpose of selling them, the ordinary rules applying to agents apply to them, so far as they are exercising their authority to sell. Thus, the Court of Common Pleas decided in the case of *Smart v. Sandars* (b), that the mere relation of principal and factor confers ordinarily an authority to sell at such times and for such prices as the factor may, in the exercise of his discretion, think best for his employer; but if he receives the goods, subject to any special instructions, he is bound to obey them. But this being the factor's usual employment, it is obvious that if he pledges the goods which he is authorised to sell, he does not act in the usual course of his employment; and if he has not an express authority to pledge, he cannot, by pledging, confer any right on the pledgee (c). It was thought expedient to alter this rule of law, and three statutes have been passed upon the subject of contracts made by factors, by which and by

30 L. J. (C. P.) 110, *S. C.* in *v. Scott*, 5 Moo. P. C. C. 357.
Ex. Ch. (c) *Martini v. Coles*, 1 M.

(b) 3 C. B. 380; 5 C. B. & Sel. 140; *Shipley v. Kyme*,
895, in Exch. Ch. See *Harrison* Id. 484.

the common law already described, those contracts are now regulated. These (and the rule applies to all instances of statute law) must be studied in their very words, although a general sketch of their effect is attempted here. The first of these statutes is 4 Geo. IV., c. 83 ; this was altered and amended by 6 Geo. IV., c. 94, and both have received amendment by the 5 & 6 Vict. c. 39. The following very succinct description of the effect of these statutes is extracted from a work of the greatest utility and accuracy, Chitty's Collection of Statutes, with notes, by Welsby and Beavan, 2nd vol. p. 47 : "First, where goods, or documents for the delivery of goods, are pledged as a security for present or future advances, with the knowledge that they are not the property of the factor, but without notice that he is acting without authority, in such a case the pledgee acquires an absolute lien. Secondly, where goods are pledged by a factor without notice to the pledgee that they are the property of another, as a security for a pre-existing debt, in that case the pledgee acquires the same right as the factor had. Thirdly, where a contract to pledge is made in consideration of the delivery of other goods or documents of title, upon which the person delivering them up had a lien for a previous advance (which is deemed to be a contract for a present advance), in that case, the pledgee acquires an absolute lien to the extent of the value of the goods given up." It will not fail to be observed that the persons whose

dealings with property or documents in their possession are within the protection of these statutes, are persons entrusted therewith as factors or agents (*d*), not persons to whose employment a power of sale is not commonly incident, as wharfingers (*e*), and that the transactions which are within the statute are mercantile transactions (*f*). The statute, therefore, does not apply to advances made upon the security of furniture used in a furnished house to the apparent owner of such furniture, such apparent owner afterwards appearing to be the agent entrusted with the custody of the furniture by the true owner. Such agent is not an agent, nor is such furniture goods and merchandise within the meaning of stat. 5 & 6 Vict. c. 39 (*f*).

Agency of
wives for
husbands.

Before leaving the subject of contracts by agents, I will advert to the topic which in a former lecture I reserved for this period, that, namely, of a wife's power to bind her husband by contract. Now it is a principle, as old as the time of Fitzherbert (*g*), that, whenever a wife's contract made during marriage binds the husband, it is on the ground that she entered into it as his agent. Thus, where the plaintiff sold music to a married woman living

(*d*) *Jenkyns v. Usborne*, 7 M. & Gr. 678; *Van Casteel v. Booker*, 2 Exch. 691; *Kingsford v. Merry*, 26 L. J. (Ex.) 83; 1 H. & N. 503, in Exch. Ch.

(*e*) *Monk v. Whittenbury*, 2 B. & Ad. 484.

(*f*) *Wood v. Roucliffe*, 6 Hare, 191.

(*g*) Fitz. Nat. Brev. 27, C.; Id. 118, F.; Id. 120, G.

with her husband, and sued the husband for the price, and the only question left to the jury was, whether the music was necessary for the wife in her station, this was held wrong, as the question ought to have been, whether the wife had the husband's authority to purchase (*h*). Now, she may be appointed his agent in the same way that any other individual may, either by express words or by implication, as I have already mentioned; and, therefore, in a case where the defendant's wife had put her brother's child to school with the plaintiff, and he had occasionally visited the child at the school, and was in the habit of paying for a variety of articles ordered by his wife for the use of his house, and amongst them he had paid a carver and gilder's bill incurred by the wife; although it was contended that these facts afforded no inference that the defendant had authorised the wife to incur the debt claimed by the plaintiff, the Court held, that it clearly was evidence of her having authority to contract that debt, although it was very slight (*i*). For the same reason, where goods for which a wife has ordinarily authority to contract on the part of her husband, as articles of dress ordered by her and delivered at his residence, where she also resides, *prima facie* the husband is liable (*k*).

<p>(<i>h</i>) <i>Reid v. Teakle</i>, 22 L. J. (C. P.) 161; 13 C. B. 627, S. C.; <i>Lane v. Ironmonger</i>, 13 M. & W. 368.</p>	<p>(<i>i</i>) <i>McGeorge v. Egan</i>, 5 Bing. N. C. 196. (<i>k</i>) <i>Jewesbury v. Newbold</i>, 26 L. J. (Ex.) 217.</p>
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Thus, also, where the plaintiff, in order to substantiate a demand for goods sold to the defendant, proved that he had a shop, in which his wife served and carried on the business of it in his absence, and that, on applying to her for the price of the goods, she said she would pay it if he would allow £10., which she claimed, and give a receipt in full; the Court thought that this was evidence from which it might be presumed that the wife was acting within the scope of her authority when she offered to settle a demand for goods delivered at a shop in which she served, and the business of which she was in the habit of conducting (*l*). But, on the other hand, where she equally carried on the business of the shop by her husband's authority, and attended to all the receipts and payments, a statement made by her that she would pay her rent on the day it would be due if it was remitted to her by her husband in time, and that the amount was £6., was held not to be evidence against her husband of the terms of his tenancy (*m*). The difference is obvious between the two cases; for, though the wife might be the agent of her husband to make payments, she is not on that account necessarily his agent to admit an antecedent contract. Therefore, if the admissibility of her statement be rested on the ground of its being evidence of an antecedent lease, it must fail. Neither does her

(*l*) *Olifford v. Burton*, 1 Bing. 199.

(*m*) *Meredith v. Footner*, 11 M. & W. 202.

agency to make payments constitute her an agent to take a lease for the benefit of her husband.

I am not, however, now speaking of that sort of agency which is purely conventional, and in no way depends on the relation of husband to wife, inasmuch as it may be conferred on any one else; but of another and a peculiar sort of agency, which is implied from the circumstance of two persons living together as man and wife, from which circumstance a presumption arises that the wife has authority to bind the husband by her contracts for necessaries suitable to his fortune and rank in life. This is very clearly explained by Lord *Holt*, in *Etherington v. Parrott* (n): "It is the cohabitation," he said, "that is an evidence of the husband's assent to contracts made by his wife for necessaries; but if the husband here solemnly declared his dissent that she shall not be trusted, any person that has notice of this dissent trusts her at his peril after; for the husband is only liable upon account of his own assent to the contracts of his wife, of which assent cohabitation causes a presumption; and when he has declared the contrary, there is no longer room for such a presumption, for the wife has no power originally to charge her husband, but is absolutely under his power and government, and must be content with what he provides; and if he does not provide necessaries, her remedy is in the

(n) *Ld. Raym.* 1006; *Camp.* 120. See *Jolly v. Rees*, *Waithman v. Wakefield*, 1 33 L. J. C. P. 177.

Spiritual Court." And, indeed, as Mr. Smith states in his *Leading Cases* (o), this is just ; for when a tradesman sees two persons living together as man and wife, he naturally infers that there is that degree of confidence and affection subsisting between them which would induce the one not to contract without authority, and the other to confer such authority for necessary purposes (p). But then this must be taken subject to two observations : first, that the contract must be *for necessities*; secondly, that the party making it must not have been forbidden to trust her.

What are
necessaries.

Now, with regard to the question what are necessities, it is a question which always and obviously depends upon the circumstances of the particular case under discussion for the time being. Servants, suitable to the husband's fortune and rank, have been held to be such necessities in a case where the defendant was Governor of Barbadoes, and his wife, being about to quit England in order to join him there, engaged the plaintiff as her maid to accompany her on the voyage (q). The question is one which is continually arising, and of which there are many reported examples. *Hunt v. De Blaquiere* (r) was an action to recover the value of furniture for a house supplied to defendant's wife, who was living

(o) 2 Smith L. C. 5th ed.
375.

(q) *White v. Cuyler*, 1 Esp.
200 ; 6 T. R. 176.

(p) *Jewsbury v. Newbold*,
supra.

(r) 5 Bing. 550.

separately from him under a sentence of divorce *a mensâ et thoro*, on the ground of adultery, against the husband, who was decreed to pay her £380. a year alimony, but did not pay it. It was contended, that furniture for a house was not necessary for a divorced wife with an income of £380. a year. The jury thought that the articles furnished were necessaries, and the Court concurred in their opinion. The allowance to the wife must be sufficient, said *Park, J.*, according to the degree and circumstances of the husband. But if the wife have a sufficient separate maintenance, what is supplied to her cannot be necessaries, and is not the more so because no part of it is supplied by the husband, but by others. He therefore, is not in such case liable to pay for them (s). But the cases most frequently referred to on the subject are *Montague v. Benedict* (t) and *Seaton v. Benedict* (u). The name of the defendant probably strikes you as fictitious, and in truth it is so, being taken from a play of Shakspeare, called *Much ado about Nothing*, in which one of the characters is a young officer named Benedict, who protests vehemently against marriage. The real defendant was a highly respectable professional gentleman ; and it was sought in *Seaton v. Benedict* to charge him with a bill contracted by his wife for articles of millinery of a very expensive description. It appeared at the

(s) *Clifford v. Laton*, M. & M. 101.

(t) 3 B. & C. 631.

(u) 5 Bing. 28.

trial that she was already supplied with all necessary articles of dress ; and the Court held, on a motion for a new trial, that the defendant was in point of law entitled to the verdict.

In the other case of *Montague v. Benedict*, the goods supplied were articles of jewellery, to the amount of £83., which had been delivered in the course of two months. The plaintiff's evidence was, that the defendant lived in a furnished house of which the rent was £200. a-year, and that the lady had a fortune of £4000. ; the defendant's that the lady was already supplied with sufficient jewellery. The jury found a verdict for the plaintiff ; but the Court set it aside, on the ground that there was no evidence to support it. Mr. J. Bayley said, "If the husband and wife live together, and the husband will not supply her with necessaries or the means of obtaining them, then, although she has her remedy in the Ecclesiastical Court, yet she is at liberty to pledge the credit of her husband for what is strictly necessary to her own support. But, whenever the husband and the wife are living together, and he provides her with necessaries, the husband is not bound by contracts of the wife, except where there is reasonable evidence to show that the wife has made the contract with his assent. Cohabitation is presumptive evidence of the assent of the husband, but it may be rebutted by contrary evidence ; and when such assent is proved, the wife is the agent of the husband duly authorised."

Indeed, the husband's assent during cohabitation, being thus presumed to be given to the wife's contracting for necessities suitable to his degree, the suitability of the things contracted for is evidently to be considered. "It is because she is the agent of her husband," said *Parke, B.*, in *Lane v. Ironmonger* (x), "that the tradesman ought to be careful not to supply her to an extravagant extent. For, giving orders to such an extent would go to show she was not acting as the husband's agent, and to the extent authorised by him."

The before-mentioned observations of Mr. J. *Bayley* support the latter of the two rules to which I adverted, namely, that the contract must not only be for necessities suitable to the husband's fortune and degree, but that the person making it must not have been forbidden to contract with the wife on his account.

Where the husband has forbidden the creditor to contract with the wife on his account.

This point, indeed, had been decided long before by the majority of the judges in the Exchequer Chamber, in the case of *Manby v. Scott* (y). The discussions in this case were exceedingly long and elaborate; and, as frequently happens in the old reports, the reasons given in some instances almost ludicrous; for instance, Mr. Justice *Twisden*, who was at first of opinion that it was not in the husband's power to prohibit another from trusting his

(x) 13 M. & W. 368.

Ed.; Bac. Abr. "Baron & Feme."

(y) 1 Lev. 4; 1 Siderfin,

109; 2 Smith L. C., 375, 5th

wife for necessaries, gave as a reason that, if he might prohibit one person, he might go on doing so till he had at last prohibited every one in England; and then, says he, if we were to join the king's enemies, his wife must go to, and then she would be hanged; which, he remarked, would be inconvenient. However, the majority of the Court were of opinion that the husband may prohibit a particular person from trusting his wife even for necessaries, and that, if he trust her in defiance of that prohibition, he cannot hold the husband liable.

Where the husband and wife live apart.

The points which we have been hitherto considering all arise in cases in which the husband and wife continue to live together. But if the wife, when she makes the contract, is living separated from her husband, the case is quite different; and the only question is, whether the separation is with the husband's assent, or produced by the husband's misconduct. If the husband drive his wife from home, or if he do so misconduct himself that it is morally impossible and unreasonable that she should continue to reside in his house, he sends her into the world with authority to pledge his credit for her necessary expenses. And this authority he cannot revoke or control by any notice or prohibition whatever. "If a man," said Lord *Eldon*, in *Rawlyns v. Vandyke* (z), "will not receive his wife into his house, or turns her out of doors,

(z) 3 Esp. 250.

he sends her with credit for her reasonable expenses."—"Where a wife's situation in her husband's house," says Lord *Kenyon* in *Hodges v. Hodges* (a), "is rendered unsafe from his cruelty and ill-treatment, I shall rule it to be equivalent to his turning her out of the house, and that the husband shall be liable for necessaries furnished to her under those circumstances" (b). Even if the husband become lunatic, and therefore unable to provide his wife with necessaries, he is in the same situation as a husband omitting to furnish them (c).

In like manner, if the husband and wife mutually consent to live apart, she has a right to bind him by contracting for her reasonable and necessary expenses as long as the consent continues (d). But in those cases in which the wife, living apart from her husband, has authority to bind him by contracts for necessaries, if he allow and pay her a sufficient maintenance, the authority is gone, and her contracts, even for necessaries, will not bind him; the reason of which is, that the authority is given by law for the wife's protection, to save her from distress occasioned by her husband's misconduct; but if he make her a proper allowance, and

Where there
is an allowance
to the wife.

(a) 1 Esp. 441.

636.

(b) See *Houlston v. Smyth*,
3 Bing. 127; *Bolton v. Pren-
tice*, Str. 1214.

(d) *Hodgkinson v. Fletcher*,
4 Camp. 70; *Nurse v. Craig*,
2 N. R. 148.

(c) *Reaul v. Legard*, 6 Ex.

pay it, there is no such danger ; and then *cessante ratione cessat lex*. Thus in *Mizen v. Pick* (e), which is one of the latest cases on this subject, the Court of Exchequer decided that it makes no difference that the tradesman, when he trusts the wife, has no notice that her husband makes her an adequate allowance.

General rule
as to contracts
during
separation.

Thus, you see that if the wife be driven from home by the husband's misconduct, or if they separate by mutual consent, she carries with her an implied authority to pledge his credit so long as that separation continues, unless he pay her an allowance adequate to *her* support and his own means. But, when the separation is occasioned neither by his misconduct nor consent, the case is otherwise. By the marriage contract, the parties contracted a relation which gave the wife certain rights which the law recognises. One of them is, that she is entitled to be supported according to the estate and condition of her husband. If she is compelled by his misconduct to procure the necessary articles for herself, as, for instance, if he drives her from his house or brings improper persons into it, so that no respectable woman could live there, he gives her authority to pledge his credit for her necessary maintenance elsewhere, which means that the law gives that authority by force of the rela-

(e) 3 M. & W. 481 ; *Johnson v. Sumner*, 27 L. J. (Ex.) 341 ; 3 H. & N. 261. See *Jolly v. Rees*, 33 L. J. (C. P.) 177 ; *Biffin v. Bignell*, 31 L. J. (Ex.) 180 ; 7 H. & N. 877.

tion of husband and wife. So, if a husband omit to furnish his wife with necessaries while living with him, she may procure them elsewhere, otherwise she would perish. As by the relation which the husband originally contracted, he undertook to provide the wife with them himself, he becomes liable to any person who does it for him (*f*): a rule which extends even to make him liable for the expenses of her funeral, when these expenses were properly incurred by the person in whose house she was residing for justifiable causes (*g*). But where a married woman is found living apart from her husband, the *prima facie* presumption is, that it is neither in consequence of his improper conduct nor by his assent. In such case she has no authority at all to pledge her husband's credit, and the person who contracts with her does so at his peril (*h*). It always lies on the person who gave her credit to show what were the circumstances under which they separated (*i*).

It only remains to observe that, where the wife, in consequence of the circumstances under which she separated from her husband, has authority to bind him by contracts, those contracts must be for

What are
necessaries for
the wife.

(*f*) *Reed v. Legard*, 6 Ex. 637, per *Alderson*, B.

(*g*) *Ambrose v. Harrison*, 20 L. J. (C. P.) 135; 10 C. B. 776; *Bradshaw v. Beard*, 31 L. J. (C. P.) 273; 12 C. B., N. S. 344.

(*h*) *Hardie v. Grant*, 8 Car. & P. 512; *Morris v. Martin*, Str. 647.

(*i*) *Reed v. Moore*, 5 Car. & P. 200; *Mainwaring v. Leslie*, M. & M. 18; *Edwards v. Towells*, 5 M. & G. 624.

necessaries suitable to his rank and means. What are such necessities, is a question which of course turns on the particular circumstances of each case (*k*). There are two modern cases involving rather singular questions : *Turner v. Rookes* (*l*), and *Grindell v. Godmond* (*m*). In *Turner v. Rookes* the husband and wife were living separate by consent, under a deed of separation, by which she had a separate maintenance of £112. a year ; so that, as long as that was paid, she would have no authority to bind the husband for necessities of an ordinary description ; but it appeared that the husband had used threats of violence towards her, which occasioned her so much alarm that she thought it necessary to exhibit articles of the peace against him. In order to do this, she was obliged to employ an attorney ; and not being able to pay his bill of costs, he brought his action to recover it against the husband. The Court held that the proceeding was necessary for the wife's safety ; and, therefore, that she had a right to bind the husband by contracting for it ; and that, though the maintenance allowed her might be sufficient for ordinary purposes, yet this was an extraordinary contingency not likely to have been contemplated in arranging the amount of maintenance, and which therefore was not covered by it ; and they held the husband

(*k*) *Hunt v. De Blaquiére*,
5 Bing. 550 ; *Ewers v. Hut-*
ton, 3 Esp. 255.

(*l*) 10 A. & E. 47.
(*m*) 5 A. & E. 755.

liable, as having, through his wife, employed the attorney to exhibit articles of the peace against himself.

The other cause was one in which the husband had assaulted and ill-treated his wife, who preferred an indictment against him at the Beverley sessions, upon which he was convicted, and sentenced to twelve months' imprisonment, and a fine of £50. The attorney, who conducted the prosecution, thinking, very correctly, that if he carried it on without funds, he would have no remedy against any one, required money in hand, which the lady borrowed from her brother, and he brought an action against the husband to be reimbursed; but the Court thought that, though it might be necessary that she should exhibit articles of the peace for her own personal security, yet that it could not be necessary that she should assume the offensive, and prefer an indictment against him, and, consequently, that the plaintiff was not entitled to recover. In the last case upon this subject, the costs of a proctor employed by a wife to prosecute a suit in the Ecclesiastical Court against her husband for a divorce *à mensa et thoro*, on the ground of cruelty, were held to be recoverable against the husband, as a necessary, if it appear that there were reasonable grounds for instituting such a suit. If the wife indict her husband for an assault, he is not liable for the costs of the prosecution, and rightly so, because that is not a proceeding for her protection,

but for the punishment of the husband. But a divorce *à mensa et thoro*, on the ground of cruelty, is a proceeding for her protection, and as she has no property of her own, she can have no redress unless she is able to pledge her husband's credit (n).

General rule. The whole of this branch of the law may be shortly summed up thus: while a wife continues to live with her husband, the presumption is that she has authority to bind him by contracting for necessities; but that presumption is subject to be rebutted. When she is living separately from him, the presumption is that she has no such authority; but that presumption also is subject to be rebutted, by showing that the separation was by consent, or occasioned by the husband's misconduct; in which cases, if he leave her without adequate funds for her support, she has a right to pledge his credit by contracting for necessities.

Remedies by which contracts may be enforced.

I have now gone through the subject which I proposed at the commencement of these lectures with the exception of the last point. I have mentioned the different sorts of contracts, the peculiarities of those by record, by writing sealed and delivered and writing not under seal; of the consideration which a simple contract requires to support it; of the effect of illegality, whether by common or statute law, in invalidating contracts; of the competency of the parties, and of the rules

(n) *Brown v. Ackroyd*, 25 819; per Lord Campbell, C. J. L. J. (Q. B.) 193; 5 E. & B.

which govern contracts entered into by those parties through the medium of agents.

It remains to point out, in a few words, the *remedies* by which the observance of contracts may be enforced, and their non-observance punished. Now, I say nothing about the remedy in Courts of equity. *There* a specific performance may, as you know, in many cases be compelled; there *was* no such thing as a specific performance to be had in a Court of law, except in the cases to which the writ of *mandamus* was applicable, which could, however, *Mandamus.* never be obtained when there was any other remedy. Now, however, by the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125, s. 68), the plaintiff in any action in any of the superior Courts, except replevin and ejectment, may indorse upon the writ and copy to be served a notice that the plaintiff intends to claim a writ of *mandamus*, and the plaintiff may thereupon claim in the declaration, either together with any other demand, which may now be enforced in such action, or separately, a writ of *mandamus* commanding the defendant to fulfil any duty, in the fulfilment of which the plaintiff is personally interested.

S. 69. The declaration in such action shall set forth sufficient grounds upon which such claim is founded; and shall set forth that the plaintiff is personally interested therein; and that he sustains, or may sustain, damage by the non-performance of

such duty ; and that performance thereof has been demanded and refused or neglected.

S. 70. The pleadings and other proceedings in any action in which a writ of *mandamus* is claimed shall be the same in all respects as nearly as may be, and costs shall be recoverable by either party as in an ordinary action for the recovery of damages.

S. 71. In case judgment shall be given to the plaintiff that a *mandamus* do issue, it shall be lawful for the Court in which such judgment is given, if it shall see fit, besides issuing execution in the ordinary way for the costs and damages, also to issue a preremptory writ of *mandamus* to the defendant, commanding him forthwith to perform the duty to be enforced.

S. 72. The writ need not recite the declaration or other proceedings, or the matter therein stated, but shall simply command the performance of the duty, and in other respects shall be in the form of an ordinary writ of execution, except that it shall be directed to the party and not to the sheriff, and may be issued in term or vacation, and returnable forthwith ; and no return thereto, except that of compliance, shall be allowed ; but time to return it may, upon sufficient grounds, be allowed by the Court or a judge, either with or without terms.

S. 73. The writ of *mandamus* so issued as aforesaid shall have the same force and effect as a preremptory writ of *mandamus* issued out of the

Court of Queen's Bench, and in case of disobedience, may be enforced by attachment.

S. 74. The Court may, upon application by the plaintiff, besides or instead of proceeding against the disobedient party by attachment, direct that the act required to be done may be done by the plaintiff or some other person appointed by the Court at the expense of the defendant; and, upon the act being done, the amount of such expense may be ascertained by the Court, either by writ of inquiry or reference to a Master, as the Court or Judge may order; and the Court may order payment of the amount of such expenses and costs, and enforce payment thereof by execution.

S. 78. The Court or a Judge shall have power, of they or he think fit so to do, upon the application of the plaintiff in any action for the detention of any chattel, to order that execution shall issue for the return of the chattel detained, without giving the defendant the option of retaining such chattel upon paying the value assessed; and that, if the said chattel cannot be found, and unless the Court or a Judge should otherwise order, the sheriff shall distrain the defendant by all his lands and chattels in the said sheriff's bailiwick, till the defendant render such chattel; or, at the option of the plaintiff, that he cause to be made of the defendant's goods the assessed value of such chattel; provided that the plaintiff shall, either by the same or a separate writ of execution, be entitled to have

made of the defendant's goods, the damages, costs and interest in such action.

Injunction.

S. 79. In all cases of breach of contracts, or other injury, where the party injured is entitled to maintain and has brought an action, he may, in like case and manner as hereinbefore provided with respect to *mandamus*, claim a writ of injunction against the repetition or continuance of such breach of contract or other injury, or the committal of any breach of contract or injury of a like kind, arising out of the same contract or relating to the same property or right; and he may also, in the same action, include a claim for damages or other redress.

S. 80. The writ of summons in such action shall be in the same form as the writ of summons in any personal action; but on every such writ and copy thereof, there shall be indorsed a notice that, in default of appearance, the plaintiff may, besides proceeding to judgment and execution for damages and costs, apply for and obtain a writ of injunction.

S. 81. The proceedings in such action shall be the same, as nearly as may be, and subject to the like control, as the proceedings in an action to obtain a *mandamus* under the provisions hereinbefore contained; and in such action judgment may be given that the writ of injunction do or do not issue, as justice may require; and in case of disobedience, such writ of injunction may be en-

forced by attachment by the Court, or, when such Court shall not be sitting, by a Judge.

S. 82. It shall be lawful for the plaintiff at any time after the commencement of the action, and whether before or after judgment, to apply *ex parte* to the Court or a Judge for a writ of injunction to restrain the defendant in such action from the repetition or continuance of the wrongful act or breach of contract complained of, or the committal of any breach of contract or injury of a like kind arising out of the same contract, or relating to the same property or right ; and such writ may be granted or denied by the Court or Judge, upon such terms as to the duration of the writ, keeping an account, giving security, or otherwise, as to such Court or Judge shall seem reasonable and just ; and in case of disobedience, such writ may be enforced by attachment by the Court, or, when such Court shall not be sitting, by a Judge. Provided always, that any order for a writ of injunction made by a Judge, or any writ issued by virtue thereof, may be discharged or varied or set aside by the Court on application made thereto by any party dissatisfied with such order.

It is clear, therefore, that injustice may now in many cases be prevented, where formerly it could only be inadequately compensated by damages. The new remedies thus given are, we see, a statutory *mandamus* to perform a duty, the specific delivery of chattels detained by the defendant, and an in-

junction against the repetition or continuance of breach of contract or other injury, or the committal of any breach or injury of a like kind. But it has been held by the Court of Queen's Bench to be quite clear that the statute did not intend to give a Court of Common Law the power to decree specific performance of a private contract; and where the duty sought to be enforced by a *mandamus* arises merely upon a personal contract, to grant a *mandamus* would be in effect to decree specific performance of such a contract (*o*). Where, therefore, the plaintiff agreed to let, and the defendant to take, a certain house upon lease for seven years from a day ensuing, the lease to be prepared at defendant's expense and executed within three months, and thereupon the plaintiff did prepare the lease, but the defendant refused to execute it, upon which the plaintiff sued him, and in his declaration claimed a writ of *mandamus* according to section 68, *supra*, the Court held that the Common Law Procedure Act did not extend to enforce this duty, which arose out of a contract merely personal (*p*). But where the duty does not arise from a merely personal contract, but under a statute or a Royal charter, and the act to be done is one in which the public as well as the plaintiff are interested, then the statute clearly applies. Therefore, where a

(*o*) *Norris v. Irish Land Company*, 27 L. J. (Q. B.) 115; 8 E. & B. 512. (*p*) *Benson v. Paul*, 25 L. J. (Q. B.) 274; 6 E. & B. 273, S. C.

company was incorporated by Royal charter, which required that provision should be made in the deed of settlement for the due registration of the shareholders, and the deed did not provide that a register of shareholders should be regularly kept and that the personal representative of a deceased shareholder should be entitled to be registered as the owner of his shares on performing certain conditions; such representative, having performed those conditions, brought an action against the company for not registering him, and claimed in his declaration a *mandamus* to the company to put him on the register: the Court held that the plaintiff was entitled to this *mandamus* by virtue of section 68 (q). In this case, the company, being incorporated by charter, wrongfully refused to register the plaintiff as a shareholder, which they were bound to do pursuant to the deed of settlement executed in compliance with the charter; there was, therefore, a public duty to be done, and a personal grievance to be redressed!

It has been thought that the *mandamus* given by this statute can be granted only in respect of such duties as might have been enforced by the prerogative writ of *mandamus*; but it rather seems that is not to be confined to such cases (r).

There can be no doubt that very important changes of practice will follow these alterations in

(q) *Norris v. Irish Land Company*, supra.

(r) *Benson v. Paul*, supra; *Bush v. Beavan*, 32 L. J. Ex. 54.

the power of the courts of law. But at present too little illustration of these enactments has been derived from adjudged cases to justify the expectation that any profitable comments could be made upon them within the limited scope of this book.

Remedy at
law is by
action.

The ordinary remedy in a court of law for breach of contract still is by *action*, and there are distinct forms of action applicable to the breach of distinct species of contract.

Scire facias
on contracts
by record.

If the contract be by record, the remedy is by writ of *scire facias*, which lies only upon a record and which has obtained its name from the Latin words it formerly contained, commanding the sheriff to make the defendant know that the Court commanded his appearance to answer why execution should not issue against him. But, in the cases in which, by reason of lapse of time or change of parties since a judgment had been obtained, and the proceeding was formerly by *sci. fa.*, the parties may now have the same benefit by a suggestion entered by leave of the Court upon the roll, or by a writ of revivor. This is by virtue of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76 ss. 128, 129.

If the record create a debt, that is, render a sum certain payable by the one party to the other, an action of debt will lie to enforce payment, if the plaintiff prefer that form of proceeding to a *scire facias*.

The action of debt lies in every case where there is a liquidated pecuniary duty from one person to another. In such case judgment by default is final (s). The action of debt.

If the contract be by deed, the remedy is by action of covenant, which lies to enforce a contract by deed, for which it is the only remedy at common law, unless the contract be for payment of a liquidated sum, in which case, as I have already said, the plaintiff may, if he prefer it, maintain an action of debt. If the contract be neither by record nor by deed,—if, in other words, it be a simple contract, either reduced to writing, or by mere words without writing,—the remedy, unless it be for payment of a fixed sum of money, in which case debt also will lie, is by an action of *assumpsit*. Action of covenant.

This was originally a sort of action of trespass upon the case, and was called *assumpsit* from the words “undertook and promised,” which always appeared in the declaration. When the Uniformity of Process Act (t) was passed, the schedule contained a form of writ in which it was described as an action on promises; in consequence of which it is now most commonly denominated *an action on promises*. It is the great remedy upon the breach of simple contracts. Action of assumpsit.

There is, besides, a sort of action called an action of *account*, which was for a long time almost com- Action of account.

(s) Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, s. 93.
(t) 2 & 3 Will. 4, c. 39.

pletely obsolete and disused, but afterwards rose again into some importance in consequence of a decision of the Court of Exchequer (*u*). But this species of action has now become totally disused in consequence partly of the greater use now made of arbitration, but chiefly in consequence of the provision in the Common Law Procedure Act, 1854 (*x*), that if, after a writ has been issued, it be made to appear to the satisfaction of the Court or a Judge, upon the application of either party, that the matter in dispute consists wholly or in part of matters of mere account, which cannot conveniently be tried in the ordinary way, the Court or Judge may decide such matter in a summary manner, or order that such matter, either wholly or in part, be referred to an arbitrator ; and the decision or order of the Court or Judge, or the award or certificate of such referee, shall be enforceable by the same process as the finding of a jury upon the matters referred.

Now, these being the remedies by which contracts are enforced in courts of law, the next question is, as to the *time* within which those remedies are to be pursued : and those times depend upon the provisions of the Acts of Parliament which we call *Statutes of Limitation*.

The policy of statutes of limitation.

The policy of the Legislature in enacting such statutes, and thereby constituting a time after the

(*u*) *Inglis v. Haigh*, 8 M. & W. 769.

(*x*) 17 & 18 Vict. c. 125. s. 3.

lapse of which engagements shall be no longer capable of being enforced, has always been considered unexceptionable.

When you find a debt or an engagement existing after the lapse of a long period of time, it is possible, indeed, that strict justice may require its enforcement, but it is also possible that great injustice may be done by enforcing it. Suppose, for instance, an executor finds a bond forty years old in his testator's repository, it may be that the principal and interest are due and unpaid, but it may also be that they have been paid; or that great part has been paid, and that the vouchers have been lost; or it may be that the bond was deposited with the testator as a collateral security, and that no liability ever in reality accrued upon it, but that the obligee forgot to reclaim it or died pending the suretyship, leaving his representatives in ignorance of the transaction. It may be quite impossible, after the lapse of forty years, to prove this. Indeed, it may be in the knowledge of no person living. Now, there would be the greatest hardship in calling upon a man, after the lapse of an indefinite space of time, to defend himself against such a demand; but there is no great hardship imposed on the obligee by requiring him to enforce his claim within a reasonable time, if he intend to enforce it at all.

Laws limiting suits are founded, says Story, on the noblest policy. They are statutes of repose, to

quiet titles, to suppress frauds, and to supply the deficiency of proofs, arising from the ambiguity and obscurity or the antiquity of transactions. They proceed upon the presumption that claims are extinguished, or ought to be held extinguished, whenever they are not litigated in the proper forum within the prescribed period. They take away all solid grounds of complaint, because they rest on the negligence or *laches* of the plaintiff himself. They quicken diligence, by making it in some measure equivalent to right. They discourage litigation, by burying in one common receptacle all the accumulation of past times which are unexplained and have now by lapse of time become inexplicable. It has been said by John Voet, with singular felicity, that controversies are limited to a fixed period of time, lest they should be immortal while men are mortal (*y*).

This, then, is the policy of the Statutes of Limitation—to prevent obsolete claims from being raked up. And now as to the time which the Legislature has appointed for the purpose of pursuing the several remedies of which I have spoken.

Limit as to
scire facias.

With regard to *scire facias*, there was, for a long while, no limitation imposed by statute to the commencement of that proceeding; but now, by 3 & 4 Will. IV. c. 42, s. 3, a *scire facias* on a recognizance must be sued out within twenty years. After the

(*y*) Story, Conflict of Laws, s. 576.

recovery of a judgment, and during the lives of the parties to it, execution may issue within six years, without reviving the judgment: 15 & 16 Vict. c. 76, s. 128. Afterwards the judgment must be revived by writ of revivor, sect. 129. This writ, if the judgment be less than ten years old, does not need any rule or order to authorise its issue; but if the judgment be more than ten years old, a rule of Court or Judge's order is necessary; and if more than fifteen years old, a rule to show cause.

An action of debt founded upon a contract made by deed was not formerly subject to any limitation in respect of the time within which it might be commenced: not that you are to suppose that there was *practically* no security against an obsolete claim founded on a deed, for the Courts had introduced a presumption that such claims were satisfied after the lapse of twenty years: and if no evidence of any acknowledgment of the existence of the claim appeared to have taken place within that time, they recommended the jury to presume payment or a release, as the nature of the case happened to require; but there was no statute which could be pleaded in bar of such action until the 3 & 4 Will. IV. c. 42, the 3rd section of which establishes the limitation of twenty years, and is as follows:—

Limit as to
action of debt
on deed.

“ That all actions of debt for *rent upon an indenture of demise*, all actions of *covenant or debt upon any bond or other specialty*, and all actions of debt

or *scire facias* upon any *recognizance*, and also all actions of debt upon any *award* where the submission is not by specialty, or for any fine due in respect of any copyhold estates, or for any *escape*, or for *money levied on any fieri facias*, and all actions for any penalties, damages, or sums of money given to the *party grieved*, by any statute now or hereafter to be in force, that shall be sued or brought at any time after the end of the present session of Parliament, shall be commenced and sued within the time and limitation hereinafter expressed, and not after; that is to say, the said actions of debt for rent upon any indenture of demise or covenant, or debt upon any bond or other specialty, actions of debt or *scire facias* upon *recognizance*, *within ten years after the end of this present session*, [A. D. 1833,] *or within twenty years after the cause of such actions or suits, but not after.*"

When the
time of
limitation
runs from.

It will be observed that the periods of limitation begin to run from the accruing of the cause of such actions or suits; and for this reason, where it is sought to investigate the question when a cause of action has accrued, recourse is very commonly had to the decisions upon the Statutes of Limitation. To an action of debt on a bond, the defendant pleaded that the cause of action did not accrue at any time within twenty years next before the commencement of the suit, and the issue raised for trial was upon a traverse of this averment. On the bond being produced at the trial, it appeared to be

a *post obit* bond, and it was proved that the party upon whose death the sum secured thereby was made payable died within twenty years. It was held that the verdict ought to be for the plaintiff (2). "What does the Legislature mean," said *Wilde*, C. J., "by the cause of action. The object of the Statute of Limitations was to prevent parties being harassed by stale demands, brought forward against them at a period when all their witnesses might reasonably be presumed to be dead, and when the circumstance of the plaintiff's having lain by so long without challenging them to make payment, afforded fair ground for presuming that the debt had been paid. The Legislature thought twenty years a convenient period, beyond which the obligor in a bond ought to be relieved from the necessity of preserving evidence in discharge of his liability. Bearing in mind, therefore, that the sole object of the Legislature was to discharge parties from demands that might and ought to have been enforced at an earlier period, we have plain means of ascertaining the intention with which they used the words 'cause of action,' that is, a cause of action capable of being enforced. We must read the words 'debt' and 'cause of action' in the plea, in the same sense in which the statute makes such a plea a bar to the action. What then is the meaning of this plea? That the action might have been

(2) *Tuckey v. Hawkins*, 4 C. B. 655.

brought more than twenty years before it was brought." Now, inasmuch as the non-commencement of the action within twenty years is a matter which the defendant is privileged to set up as a defence, and the plaintiff meets that by replying "that the cause of action did accrue within twenty years," the accruing of the cause of action being the point from which the time begins to run within which an action may be brought, the Court held, that even the concealment of the accruing of the cause of action does not prevent this time from beginning to run from the same point, and that even the fraudulent concealment of the fact will not prevent the period of limitation from elapsing (a). In the Courts of Chancery (b), in most cases, this injustice would be prevented,—a difference in the administration of the law, arising from the different modes of administering relief, which have hitherto prevailed in those Courts. But if a bond be conditioned to do various things, the first breach of one of those conditions is not, as will readily be supposed, such an accruing of the cause of action on the bond as will prevent the obligee from suing for subsequent breaches of the obligation to do other of those things, any more than it would be

(a) *Imperial Gas Co. v. London Gas Co.*, 23 L. J. (Ex.) 303; 10 Ex. 39, S. C. See *Hunter v. Gibbons*, 26 L. J. (Ex.) 1; 1 H. & N. 459. (b) *Blair v. Bromley*, 16 L. J. (Ch.) 105; 5 Hare, 542, S. C.; *Smith v. Pococke*, 22 L. J. (Ch.) 545; *sed quere*.

confined to that period from the first breach of a covenant to do such things (c).

The action of *covenant* is liable to the same observations as the action of debt founded on a deed; the same section of 3 & 4 Will. IV. c. 42, has (as you will observe) applied the limitation of twenty years to it also.

Limit as to
the action of
covenant.

Now, from these limitations thus introduced by 3 & 4 Will. IV. c. 42, there are certain excepted cases.

Exceptions.

In the first place, by the 4th section of the Act, if the person entitled to bring the action be an infant, a married woman, an insane person, or beyond the seas at the time when the right of action accrues, the time runs not from the accrual of the right of action, but from the removal of disability, as it is called.

In the second place, if the defendant be beyond seas, the time runs from his return: that is also by the Act.

In the third place, if an acknowledgment of the liability be given in writing, signed by the person liable or his agent, the time runs from the date of that acknowledgment. This is by sect. 5. It is important, therefore, to ascertain what is sufficient to constitute such an acknowledgment. It is required by the statute to be made by writing, signed by the party liable by virtue of such indenture,

specialty, or recognizance, or by his agent. Where the acknowledgment is expressly made for the purpose of preventing the operation of the statute, no difficulty arises. But, where admissions have been made for other purposes, and it is sought to convert them into equivalents for the acknowledgment required by the statute, some nicety occurs as it always does when a question of equivalents arises. Thus, where an action was brought by an executor on a covenant in an indenture of mortgage executed by the defendant to the testator in June, 1824, to secure payment of the money borrowed and interest, and the defendant relied upon the lapse of time as a defence, the plaintiff attempted to prove an acknowledgment by giving in evidence a deed executed within twenty years by the defendant. The deed recited the execution of the mortgage by the defendant to the testator, for securing certain money and interest, and stated that he conveyed the property mortgaged, with other things, to trustees to sell, and to pay out of the proceeds the mortgage and other incumbrances on the property; and the Court of Exchequer held that this was not such an acknowledgment as was required by the statute (*d*), not being an admission of any existing debt. On the other hand, where the action was on a covenant in a mortgage-deed, to pay the plaintiff principal and interest on the 1st

(*d*) *Howcutt v. Bonser*, 3 Exch. 491.

November, 1830, and the question on a defence of the Statute of Limitations was upon the fact of an acknowledgment of the debt, the plaintiff proved a deed of conveyance from the defendant to Thompson of the equity of redemption in the premises mortgaged. It was dated within twenty years, and after reciting the mortgage-deed, recited also that the principal sum still remained due by virtue of that deed, all the interest having been paid up to the date. It also contained a covenant by Thompson with the defendant to pay the principal and interest, and to indemnify the defendant in case he should be called upon to pay them. The deed, said the Court, furnishes ample evidence that all interest was paid up to the date stated, for the fact is expressly recited, and the date is within twenty years (e).

In the fourth place, if there have been a part payment, either of principal or interest, the time runs from such payment: this is also by sect. 5.

In the fifth place, if an action have been brought,

(e) *Forsyth v. Bristow*, 22 L. J. (Ex.) 255; 8 Ex. 347, S. C. See *Morley v. Morley*, 5 De G. M. & G. 610; 25 L. J. (Ch.) 1; *Roddam v. Morley*, 25 L. J. (Ch.) 329; 2 K. & J. 336; reversed in 26 L. J. (Ch.) 428; 1 De G. & J. 1. See further *Thorne v. Kerr*, 25 L. J. (Ch.) 57; 2 Kay & J. 54; *Jortin v. S. E. Ry. Co.*, 24 L. J. (Ch.) 343; 6 De G. M. & G. 270; *Burrows v. Gore*, 6 H. L. C. 907; *Dixon v. Holdroyd*, 27 L. J. (Q. B.) 43; 7 E. & B. 903; *Moodie v. Bannister*, 28 L. J. (Ch.) 881; 4 Drew. 433.

and the defendant outlawed, or judgment obtained against him, and arrested or reversed by writ of error, a new action may be commenced within a year after the reversal of the outlawry or of the judgment : this is by sect. 6.

Such is the statutable time of limitation in actions on specialties, which, you will have observed, is now in every case twenty years, subject to the above exceptions. Now with regard to simple contracts :—

Limitation
for actions of
debt and
assumpsit.

The limitation of time in cases of actions upon simple contracts, whether brought in the form of debt or of assumpsit, depends upon stat. 21 Jac. I. c. 16, which applies both to *assumpsit* and to *debt on simple contract*. The words of the Act are, “that all actions of account upon the case (other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants), and all actions of debt grounded upon any lending or contract without specialty, and all actions of debt for arrearages of rent, shall be commenced and sued within six years next after the cause of such action or suit, and not after.” *Assumpsit*, as I have explained to you, was originally a species of action on the case (*f*). It therefore falls within the limitation prescribed by this statute, the period limited by which is, as you probably know, *six years*.

(*f*) *Battely v. Faulkner*, 3 B. & Ald. 294, per *Holroyd*, J.

All actions upon simple contracts must therefore be commenced within *six years*, unless they fall within certain classes excepted from the operation of the statute of James I. Exceptions in favour of certain classes.

In the first place, that statute excepts (*g*) the five cases of the *person entitled to the action* being an infant, married, insane, imprisoned, or beyond seas at the time of the accruing of the right, and gives six years from the removal of the disability.

It had been doubted whether this proviso applied to the case of a foreigner living abroad, because if he came to England without having been here before, he could not be said to have *returned* from beyond seas, as it is expressed in this statute; and, consequently, there being no period from which the exceptional six years could, in this case, run, he was not within the proviso of the statute, and must therefore bring his action within six years from the time of the cause of action accruing. But the Common Pleas held that this was not so, and the Chief Justice *Jervis* said, "I do not think the fair meaning of the word 'return' is, to refer it to the coming back of persons who have been here before; I think the meaning of the proviso is, that an action shall not be commenced after six years, but if the plaintiff was abroad when the right of action accrued, then when he comes to England the statute is to begin to run against him" (*h*).

(*g*) Sect. 7.

L. J. (C. P.) 217; 13 C. B.

(*h*) *Lafond v. Raddock*, 22 813, S. C.; *Strithorst v.*

But it has been thought expedient to take away this exception in favour of persons imprisoned or beyond seas; and by the statute 19 & 20 Vict. c. 97, s. 10, no person is entitled to any time beyond the period fixed by the previous enactment, *to commence* an action or suit, by reason of such person, or one or more of such persons, being at the time when such action or suit accrued beyond seas or imprisoned (*i*).

Outlaws.

In the second place, the statute of James I. also contains the exception, in the case of the defendant being outlawed (*k*), or the judgment reversed or arrested, which I have just cited with regard to actions upon specialties. Indeed, the one is copied from the other.

Defendant
"beyond
seas."

In the third place, if the *defendant* be beyond seas when the right accrued, the plaintiff has six years after his return, not by the statute of James, but by stat. 4 Anne, c. 16, s. 19 (*l*); but it is a singular thing that "beyond seas" does not mean the same thing in this Act of Parliament as in the Acts of James and William IV.; for by 3 & 4 Will. IV., c. 42, s. 7, it is directed that no part of the United Kingdom, or of Guernsey, Jersey, Alderney, Sark, or Man, shall be considered beyond seas,

Meaning
of "beyond
seas."

Græme, 3 Wils. 145; *Williams v. Jones*, 13 East, 439.

(*i*) See *Cornill v. Hudson*, 27 L. J. (Q. B.) 8; 8 E. & B. 429.

(*k*) Sect. 4.

(*l*) *Fannin v. Anderson*, 7 Q. B. 811; *Toines v. Mead*, 24 L. J. (C. P.) 89; 16 C. B. 123.

within the meaning of that Act or of the Act of James I. ; but, as the statute of Anne is not mentioned, it is held that the words "beyond seas" used in that Act retain their common law meaning, which was literally beyond the sea surrounding Great Britain. The Court of Exchequer, therefore, decided, in *Lane v. Bennett* (*m*), that Ireland is not within the statute of Anne, and that the plaintiff has six years in which to bring his action after the return of the defendant, who had been in that part of the United Kingdom ever since the cause of action accrued. But this condition of the statute law, although well worth observing, does not now exist, the Legislature having enacted in the statute 19 & 20 Vict. c. 97, s. 12, that these places shall be within the statute of Anne in like manner as they are within the 3 & 4 Will. IV. c. 42, s. 7. Such are the points of time from which Statutes of Limitation begin to run ; and it must be remembered that in every case of a Statute of Limitations, if once the time of limitation begins to run, nothing that happens afterwards will stop it (*n*).

There was, moreover, a very important distinction between co-plaintiffs and co-defendants. It is clear

(*m*) 1 M. & W. 70. See *Earl of Mornington*, 26 L. J. (Q. B.) 181 ; 7 E. & B. 283 ; *Battersby v. Kirk*, 2 Bing. N. C. 584. *Sturgis v. Darrell*, 28 L. J.

(*n*) *Smith v. Hill*, 1 Wils. (Ex.) 366 ; 4 H. & N. 622, 134 ; *Rhodes v. Smethurst*, 6 S. C. in Exch. Ch. ; 29 L. J. M. & W. 351 ; *Curlewis v.* (Ex.) 472.

that a sole plaintiff might, if he chose, bring his action while abroad or wait till his return, when the statute began to run (*o*) ; and co-plaintiffs, if some be abroad and others in England, must have sued within six years from the cause of action accruing (*p*) : but where one of two co-contractors who is a defendant, is beyond seas, the statute did not run ; for it has been decided (*q*), that although the statute commences to run when the right of action accrues, where there are several joint *claimants*, and one of them is within seas, yet where there are joint *debtors*, and one of them is abroad when the cause of action arises, the statute did not begin to run until his return. Thus the important distinction I have mentioned between the position of co-plaintiffs and co-defendants arises. This distinction is founded upon the wording of the 19th section of the statute of Anne, c. 16, compared with the 21 Jac. I. c. 16 ; and the reason of it seems to be, that one plaintiff can act for others and use their names in an action, and therefore the protection of the statute is not wanted. With respect to defendants, however, the reason does not apply ; the plaintiff may not be able to bring the absent defendant into Court by any act of his, and therefore, if he be compelled to sue those who are within seas without

(*o*) *Le Vaux v. Berkeley*, 5 516 ; *Strithorst v. Græme*, 3 Q. B. 836. Wils. 145.

(*p*) 2 Wms. Saund. 121. (*q*) *Fannin v. Anderson*, See *Perry v. Jackson*, 4 T. R. supra.

joining those who are abroad, he may possibly recover against insolvent persons, and lose his remedy against the solvent ones who are absent. On the other hand, if he sues out a writ against all, and either continues it without declaring, or proceeds to outlawry against the absent parties, and declares against those within seas, he is placed in precisely the same situation as if the statute of Anne had never passed, and is obliged to incur fruitless expense, the avoiding of which seems to have been the object of the statute of Anne. But this evil is remedied by the statute so often cited, and now the Statutes of Limitations before mentioned run as to the joint debtor who is not beyond seas, from the time when the action or suit accrued ; but there is no bar from commencing an action, &c., against a joint debtor who was beyond seas, after his return, by reason of judgment having been recovered against another who was not beyond seas (r).

It seems also that if, after the Statute of Limitations have begun to run, the right to sue and the liability to be sued, meet in the same person by any act of the law, as where a debtor to the deceased becomes his administrator, the running of the statutes is suspended while they so continue (s).

(r) 19 & 20 Vict. c. 97, L. J. (Ch.) 918; *Mills v. s. 11*; *King v. Hoare*, 13 M. Borthwick, 35 L. J. (Ch.) & W. 494. 31.

(s) *Seagram v. Knight*, 36

Acknowledg-
ment by
writing
signed.

In the fourth place, if the defendant have given an acknowledgment *by writing signed*, the protection of the statute is removed. After the passing of the statute of James, and until Lord Tenterden's Act, which I shall immediately mention, an acknowledgment by mere *words* would have been sufficient; but by that, which is the 9 Geo. IV., c. 14, the acknowledgment must be in *writing*, "signed by the party chargeable." It enacts "that no acknowledgment or promise *by words only* shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby; and that where there shall be two or more joint contractors, or executors, or administrators of any contractor, no such joint contractor, executor, or administrator shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by *any other or others of them*; provided always, that nothing herein contained shall alter, or take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever: provided also, that in actions to be commenced against two or more joint contractors, or executors, or administrators, if it

shall appear at the trial or otherwise that the plaintiff, though barred by either of the said recited Acts or this Act, as to one or more of such joint contractors, or executors, or administrators, shall nevertheless be entitled to recover against any other or others of the defendants by virtue of a new acknowledgment, or promise, or otherwise, judgment may be given and costs allowed for the plaintiff, as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff."

No part of the statute has given rise to more litigation than this saving clause; but it is now settled that the acknowledgment, in order to bar the statute, must contain an unconditional promise to pay. Such promise the law implies from an acknowledgment of the debt, provided it be an acknowledgment or admission so distinct that a promise to pay may be *reasonably* inferred from it (*t*).

Many of the older cases display a different doctrine (*u*). These, however, are expressly overruled by the leading case of *Tanner v. Smart* (*x*), where, in an elaborate judgment, Lord *Tenterden*, C. J., says, "The only principle upon which it (an ac-

Whether the acknowledgment revives the original debt.

(*t*) *Collis v. Stack*, 26 L. J. (Ex.) 138; 1 H. & N. 605; *Holmes v. Mackrell*, 3 C. B. (N. S.) 789; *Godwin v. Culley*, 4 H. & N. 373; *Holmes v. Smith*, 8 Ir. (Com. Law Rep.) 424; *Cornforth v. Smith*, 29 L. J. (Ex.) 228. (*u*) *Yea v. Fouraker*, 2 Burr. 1099; *Thornton v. Ilingworth*, 2 B. & C. 824. (*x*) 6 B. & C. 603; *Turney v. Dodwell*, 23 L. J. (Q. B.) 137; 3 E. & B. 136, *S. C.*

knowledge) can be held to be an answer to the statute is this, that an acknowledgment is evidence of a new promise, and as such constitutes a new cause of action, and supports and establishes the promise which the declaration states. Upon this principle, whenever the acknowledgment supports any of the promises in the declaration, the plaintiff succeeds; when it does not support them, *though it may show clearly that the debt has never been paid, but is still a subsisting debt*, the plaintiff fails." This decision was based chiefly on that of *Heyling v. Hastings* (y), one of the oldest cases on the statute, and has been recognised and cited in almost every subsequent case on the point (z).

There must be a promise, or an acknowledgment implying one, to bar the statute.

As long as the doctrine prevailed, that it sufficed to show an acknowledgment which rebutted the presumption arising from the lapse of time that the claim was satisfied, it was not only immaterial whether a promise were made or not, but a condition with which such promise, if made, might chance to be coupled, would nowise have defeated the effect and virtue of the acknowledgment: for the acknowledgment was held to be in itself a bar to the statute, and no promise, either express or implied, was required. In *Dowthwaite v. Tibbut* (a),

(y) Comyn, 54; Salk. 29, *Cripps v. Davis*, 12 M. & W. 159; *Hart v. Prendergast*, 15

(z) *Morrell v. Frith*, 3 M. & W. 402; *Bateman v. Pinder*, 3 Q. B. 574; *Hurst v. Parker*, 1 B. & Ald. 92; L. J. (Ex.) 223; 14 M. & W. 741, S. C.; *Williams v. Griffith*, 3 Ex. 335.

(a) 5 M. & Sel. 75.

the debtor said, he "*would not*," and in *Leaper v. Tatton* (b), he "*could not*" pay ; and yet in both they were held to have sufficiently admitted the debt. But according to the doctrine now adopted from *Tanner* and *Smart*, any conditional promise defeats the acknowledgment: so that, however strongly the debt may be admitted, unless there be a promise to pay it, express or implied, it cannot be enforced. Lord *Tenterden* said, in *Tanner v. Smart*, "Upon a general acknowledgment, *where nothing is said to prevent it*, a promise to pay may and ought to be implied ; but where the party guards his acknowledgment, and accompanies it with an express declaration to prevent any such implication, why shall not the rule '*Expressum facit cessare tacitum*' prevail?" So rigorously has this been followed, that, in the case of *Hart v. Prendergast* (c), the following written statement was held an insufficient "acknowledgment or promise" to satisfy the statute: "I will not fail to meet Mr. H. (the plaintiff) on fair terms, and have now a hope that before, perhaps, a week from this date I shall have it in my power to pay him, at all events, a portion of the debt, when we shall settle about the liquidation of the balance." *Pollock*, C. B., held, "It is not sufficient that the document contains a promise by the defendant to pay *when he is able, or by bill*, or a mere *expectation* that he shall

Conditional
promises no
longer suffice.

(b) 16 East, 420.

(c) *Supra*.

pay at some future time ; it should contain either an unqualified promise to pay, that is, a promise to pay *on request*, or if it be a conditional promise, or a promise to pay on the arrival of a certain period, the performance of the condition or the arrival of that period should be proved by the plaintiff. The only question in the present case is, whether this letter contains a promise to pay the debt on request. Now, certainly, it does not in terms contain such a promise" (*d*).

This doctrine as to conditional ability has been carried further, on the authority of *Tanner v. Smart*, in the case of *Waters v. Earl of Thanet* (*e*), where the defendant gave an acknowledgment of certain overdue bills of exchange in a memorandum thus worded : " I hereby debar myself of all future plea of the Statute of Limitations in case of my being sued for the recovery of the amounts of the said bills and of the interest accruing thereon at the time of my being so sued : and I hereby promise to pay them, separately or conjointly, with the full amount of legal interest on each or both of them, whenever my circumstances may enable me to do so, and I may be called upon for that purpose." Now in this case the defendant had become

(*d*) *Spong v. Wright*, 9 M. & W. 692 ; *Morrell v. Frith*, supra ; and *Cripps v. Davis*, 12 M. & W. 159 ; *Bush v. Martin*, 33 L. J. (Ex.) 17 ; *Cock-
erill v. Sparke*, 32 L. J. (Ex.) 118.
(*e*) 2 Q. B. 757 ; *Lee v. Wilmot*, 35 L. J. (Ex.) 175.

able to pay the bills above six years before the action was brought ; but the plaintiff was ignorant of it. But it was decided, that, when a debtor protected by the statute promises to pay whenever he may be able, the creditor is expected to be on the watch, and when he brings his action must prove the ability which revives his right. The period at which it is revived is that of the fact taking place, *not* of his becoming acquainted with it.

These decisions have been thought unsupported by the case of *Heyling v. Hastings*, from which that of *Tanner v. Smart* derived its authority, and even at variance with it : the words there used by the debtor were, "Prove it, and I will pay you : " and it was held, that "the promise, *though conditional*, shall bring it back within the statute, *for the defendant waives the benefit of the Act as much as by an express promise ;*" and *Holt*, C. J., having reserved the point, ten judges conferred and approved of the judgment ; adding, that if the creditor proved the delivery of the goods, which he might do *at the trial*, it would suffice to take the case out of the statute (*f*). The law, however, seems settled (*g*) ; and in a very recent case it was held that although a simple acknowledgment of the

Remarks on
the foregoing
decision.

(*f*) 1 Ld. Raym. 389, and 421 ; Salk. 29, *S. C.*

(*g*) *Smith v. Thorne*, 21 L. J. (Q. B.) 199 ; 18 Q. B. 134, Ex. Ch. ; *Rackham v. Mar-*

riott, 26 L. J. (Ex.) 315 ; 2 H. & N. 196, Ex. Ch. ; *Hughes v. Paramore*, 24 L. J. (Ch.) 681 ; *Everett v. Robertson*, 28 L. J. (Q. B.) 23.

debt, without any qualification, may be sufficient to bar the Statute of Limitations, because the law will infer a promise to pay the debt; yet if there be anything to qualify the acknowledgment or make it doubtful, it is not sufficient. Therefore, where there was merely a proposal that if so much was allowed on one side so much should be allowed on the other, and, independently of such condition, there was no acknowledgment of the debt, it was considered to be no bar to the statute (*h*).

Where the condition is performed the action may be brought.

If the evidence be of a promise to pay on condition, and the condition be performed, it becomes absolute, and is a promise to pay on request. For instance, where the acknowledgment was, "I am in receipt of your letter of the 6th, handed me this morning. I have forwarded it to Mrs. J., with a request she will come over without delay to settle the business. May I beg you will write to her by the first post to press payment, and what she may be short I will assist to make up. I send you her address." This was held sufficient (*i*).

It has been also held, that an acknowledgment may *prima facie* satisfy the statute, but that other evidence is admissible to rebut such inference; such, for example, as shows that a document was

(*h*) *Francis v. Auckesbury*, B. (N. S.) 745.
 28 L. J. (Q. B.) 70; *Goate* (*i*) *Humphreys v. Jones*, 14
 v. *Goate*, 1 H. & N. 29; M. & W. 3, per Parke, B.
Buckmaster v. Russell, 10 C.

drawn up with a view to the debt being paid in a particular way (*k*).

It is not necessary that the sum due should be named : but if there is an unequivocal admission of the debt, and a difference only upon the amount, the operation of the statute is barred (*l*).

The precise sum need not be named.

Whether an acknowledgment is a sufficient admission or not to take a case out of the statute, being substantially a question of the construction of a written document, is for the judge and not the jury (*m*).

The promise or acknowledgment must, in all cases, be made before action brought ; it is unavailable if made afterwards (*n*).

The promise must be before action brought.

As observed before, the Court of Common Pleas has decided, in *Hyde v. Johnson* (*o*) that, there being no mention of an agent, a signature by an agent is not sufficient for the purpose, so that it is curious enough to observe, that under this Act a man's agent cannot bind him by the acknowledgment of a simple contract debt, though he may by acknowledging a bond debt which is a contract of so much more importance in the eye of the law. But this anomaly has been removed, and the signature of

Signature.

(*k*) *Cripps v. Davis*, 12 M. & W. 159. See *Collinson v. Margesson*, 27 L. J. (Ex.) 305.

(*l*) *Waller v. Lacy*, 1 M. & Gr. 54 ; *Gardner v. M'Mahon*, 3 Q. B. 561.

(*m*) *Sidwell v. Mason*, 26 L. J. (Ex.) 407 ; 2 H. & N. 306

(*n*) *Bateman v. Pinder*, 3 Q. B. 574.

(*o*) 2 Bing. N. C. 776.

an agent, both within this statute and the 16 & 17 Vict. c. 113, ss. 27 and 24, is now sufficient (*p*).

Payment of
principal or
interest.

There is still another and a fifth exception. This arises from a clause in Lord Tenterden's Act, which exempts from the operation of that Act the effect of any payment, whether of principal or interest. Before Lord Tenterden's Act, a part payment, whether of principal or interest, had the effect of taking the debt in respect of which it was paid out of the operation of the statute (*q*), and therefore will have the same effect since (*r*). Indeed, from the case of *Whitcomb v. Whiting* just cited, you will see that where there are several joint debtors, payment by one took the debt out of the operation of the statute *as against the others*. But it has been enacted, that for the future part payment by one shall not deprive another of the benefit of the enactments of the Statute of Limitations (*s*).

Payment of
part of
principal or
interest
suffices.

There have been many decisions as to what is a sufficient payment to bar the statute, of which some notice is expedient. In *Bateman v. Pinder* (*t*), *Wightman*, J., said, "Part payment is an

(*p*) 19 & 20 Vict. c. 97, s. 13. (Chanc.) 548.

(*q*) *Whitcomb v. Whiting*, Dougl. 652; *Goddard v. Ingram*, 3 Q. B. 839.

(*r*) *Wyatt v. Hodson*, 8 Bing. 309; *Channell v. Ditchburn*, 5 M. & W. 494; *Bamfield v. Tupper*, 7 Exch. 27; *Fordham v. Wallis*, 22 L. J.

(*s*) 19 & 20 Vict. c. 97, s. 14. *Thompson v. Waithman*, 26 L. J. (Ch.) 1080; 3 Drew. 628; *Jackson v. Woolley*, 27 L. J. (Q. B.) 448, Ex Ch. See 27 L. J. (Q. B.) 181; *Ridd v. Moggridge*, 2 H. & N. 567.

(*t*) 3 Q. B. 574.

acknowledgment, and an acknowledgment, though not a promise in terms, may amount to one virtually ; but, where it is not made till after action brought, it cannot prevent the operation of the statute." Part payment by an agent must therefore be by such an agent as is authorised to make such payments by the parties to be bound by this act ; and, therefore, if made by a receiver appointed by the Court of Chancery without the sanction of such parties, his payments do not amount to any acknowledgment by them, and do not against them take the case out of the statute (*u*). And this part payment may be made by a bill, as well as by money, for the statute intending to make a distinction between mere acknowledgments by word of mouth, and acknowledgments proved by the act of payment, it cannot be material whether such payment be afterwards avoided by the thing turning out to be worthless. The intention and the act by which it is evinced remain the same. The word payment must be taken to be used by the Legislature in a popular sense, large enough to include the species of payment by a bill (*x*). Part payment of interest equally suffices (*y*). Nor is it essential that money or a bill should actually pass ; for the statement of a mutual settlement of account between

(*u*) *Whitley v. Lowe*, 2 De 136.
G. & J. 704. (*y*) *Dowling v. Ford*, 11 M.
(*x*) *Turney v. Dodwell*, 23 & W. 329.
L. J. (Q. B.) 137 ; 3 E. & B.

the parties is equivalent to a payment, if the party to whom the debt is owing agree that it shall be paid by the setting off of the same amount, so that the sum set off is evidence of payment, if the party against whom it is set off did not object to it when his account was settled (z). The principle of this is, that the going through an account with items on both sides, and striking a balance, converts a set-off into a payment, and is a transaction out of which a new consideration may be said to arise (a).

Where a specific sum of money is due, as upon a promissory note, the mere fact of a payment of a smaller sum by the debtor to the creditor is some evidence of a part payment to take the case out of the Statute of Limitations (b). The object and effect of such payments are rather matters of evidence than of law (c); as where a party, on being applied to for interest, paid a sovereign, and said he owed the money, but would not pay it, it was considered to be a question for the jury to say whether he intended to refuse payment, or merely spoke in jest (d). The question will always turn upon the distinction between cross demands and set off on the one hand, and part payment on the

(z) *Scholey v. Walton*, 12 M. S. C. & W. 510.

(a) See also *Ashby v. James*, 11 M. & W. 542. J. (Chanc.) 780.

(b) *Burn v. Boulton*, 15 L. Exch. 118. J. (C. P.) 97; 2 C. B. 476,

(c) *Nash v. Hodgson*, 23 L.

(d) *Wainman v. Kynman*, 1

other: a distinction clear enough in principle, but dependent for its application on facts, and therefore not always applicable with ease (e).

On the construction of this part of Lord Tenterden's Act, the case of *Waters v. Tompkins* (f) contains the following important observations, with which this exception will be amply explained,—
 “On the perusal of the first clause of Lord Tenterden's Act, it would seem that the proviso takes the case of part payment of principal, or payment of interest, out of the operation of the statute altogether; and therefore that these facts would not only have the same effect, but might be proved exactly in the same way that they would have been if the Act had not passed, and consequently, by the defendant's parol admission, which species of proof of a simple fact is not exposed to the same degree of danger as attended the admission of acknowledgment of the debt itself. But the Court of Exchequer, in the case of *Willis v. Newham* (g), decided that the verbal acknowledgment of part payment of a debt was insufficient; and they construed the Act as containing a general provision, that, in no case should an acknowledgment or promise by words only be sufficient to take the case out of the Statute of Limitations, whether such acknowledgment were of the existence of the debt, or of the

(e) *Worthington v. Grimsditch*, 15 L. J. (Q. B.) 52; 7 Q. B. 479, S. C.; *Waugh v. Cope*, 6 M. & W. 824.
 (f) 2 Cr. M. & R. 726.
 (g) 3 Y. & J. 518.

fact of part payment, and they considered the proviso as leaving to the fact of part payment if properly proved, that is not by an acknowledgment only, the same effect which it had before the statute. And this construction of the Act certainly extends the remedy and obviates the mischief to be guarded against, in a greater degree than the words taken in their ordinary sense would do. But if part payment or payment of interest is proved in any legal mode, and not by admission only, this case is no authority that such proof is not sufficient. The Act of 9 Geo. IV., as explained by that case, does not prohibit or qualify the ordinary mode of legal proof in any respect, save that it requires something more than mere admission; the meaning of part payment of the principal is not the naked fact of payment of a sum of money, but payment of a smaller on account of a greater sum due from the person making the payment to him to whom it is made; which part payment implies an admission of such greater sum being then due, and a promise to pay it; and the reason why the effect of such a payment is not lessened by the Act is, that it is not a mere acknowledgment by words, but it is coupled with a fact. The same observation applies to the payment of interest. But if the payment of a sum of money is proved as a fact, and not by mere admission, there is nothing which requires the appropriation to a particular account to be proved by an express declaration of the party making it at the time; such appropriation may be shown by

any medium of proof, and many instances might be put of full and cogent proof of such appropriation, where nothing was said at the time by the debtor—as for example, if the day before the debtor had called and informed the creditor that he would, the day after, send his clerk with a specific sum, on account of the larger debt, then described, for which the action was brought, and should require a receipt for it, and the clerk did pay that specific sum and took the creditor's receipt, expressly stating the account on which it was received, and delivered it to his employer, there could be no doubt that such evidence would not only be admissible, but if distinctly proved, at least as satisfactory as a declaration accompanying the act of payment." After considering attentively the reasoning here quoted, the student will be prepared to hear, that by a recent case it has been decided that, as regards the evidence of payment, an *admission* of payment suffices, although not in writing, but merely by word of mouth (*h*).

Evidence of
payment.

The last exception to which I have to advert is that arising out of the exception in the statute of James the First, of accounts between merchant and merchant. I advert to this only for the purpose of showing that this exception, like several others, has been abrogated by the statute 19 & 20 Vict. c. 97, s. 9. And now all actions of account for not ac-

Merchants'
accounts.

(*h*) *Cleave v. Jones*, 20 L. S. C., in Exch. Ch. J. (Exch.) 238; 6 Exch. 573,

counting, and suits for such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, shall be commenced and sued within six years after the cause of such actions or suits, or when such cause has already arisen, then within six years after the passing of this Act, and no claim in respect of a matter which arose more than six years before the commencement of such action or suit, shall be enforceable by action or suit by reason only of some other matter of claim comprised in the same account having arisen within six years before the commencement of such action or suit (i).

Rules of construction.

There are a few other rules applicable alike to every species of contract, and which it is convenient to notice in a work treating like this of the general principles of the law of contracts. These are the rules according to which contracts are construed in courts of justice, and the student will probably find them deserving of much interest when he observes that they are not merely conventional rules of law, but are the canons by which all writings of every description are construed, and by which the meaning and intention of men are ascertained (k), when that meaning and intention are indicated not by their words or writings only, but by their actions and conduct also.

(i) See *Inglis v. Haigh*, 8 M. & W. 769; *Cottam v. Partridge*, 4 M. & Gr. 271. (k) *Doe d. Hiscocks v. Hiscocks*, 5 M. & W. 363; ante, p. 48.

It is obviously of the utmost importance that these rules of construction should be applied with consistency, and indeed, as far as practicable, with uniformity. In order to secure the attainment of these objects, the construction of all written instruments belongs to the Judges, who may reasonably be expected to apply with uniformity the rules with which they are by study and experience familiar, and not to the jury, whose habits of mind and experience are necessarily different and various, and who, in many cases not being familiar with the rules, and in all cases practically unacquainted with their application, cannot reasonably be expected to apply them with uniformity.

Construction
of written
instrument for
Judge.

The construction of all written instruments, therefore, belongs to the court alone (*l*), whose duty it is to construe all such instruments as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury; and it is the duty of the jury to take the construction from the court, either absolutely, if there be no words to be construed as words of art or phrases of commerce, and no surrounding circumstances to be ascertained; or conditionally, when those words or circumstances are necessarily referred to them. Unless this were so, there would be no certainty in

(*l*) *Nielson v. Harford*, 8 M. & W. 823. *v. Glenister*, 33 L. J. (C. P.) 185. See *Smith v. Thompson*, 8 C. B. 44; *Skull*

the law ; for a misconstruction by the court is the proper subject (by means of a bill of exceptions) of redress in a court of error ; but a misconstruction by the jury cannot be set right at all effectually. A very good example of what is here said, as well as a clear statement of the rules of construction which the judges apply, is furnished in the case of *Simpson v. Margitson* (*m*) ; where the plaintiff, an auctioneer, had been employed to sell an estate upon the terms of a letter from the defendant to him, which contained these words, “the terms upon which the sale of the North Cove estate is offered to you are £1. per cent. upon the purchase-money ; that to include every expense, and to be paid, if sold by auction or within two months after ; half per cent. if not sold at auction or within two months after, upon a reserved price.” The defendant contended, that month in temporal matters meant lunar month ; unless either from the context or from the usage in a trade, business, or place, it is made to appear that the parties intended another meaning ; and nothing of the sort appearing in that case, that it was the duty of the judge to have construed the contract and decided against the plaintiff. “If the context,” said the Court, “shows that calendar months were intended, the Judge may adopt that construction (*n*). If the surrounding circumstances at the time when the

(*m*) 11 Q. B. 23.

Sel. 111; *Regina v. Chawton*,

(*n*) *Lany v. Gale*, 1 M. & 1 Q. B. 247.

instrument was made show that the parties intended to use the word not in its primary or strict sense, but in some secondary meaning, the Judge may construe it from such circumstances according to the intention of the parties (*o*). If there is evidence that the word was used in a sense peculiar to a trade, business, or place, the jury must say whether the parties used it in that peculiar sense (*p*). If the meaning of a word depends upon the usage of the place where anything under the instrument is to be done, evidence of such usage must be left to the jury (*q*). Also, the jury may have to give the meaning of some technical words. But the present is not within either of the above principles; nor can we find any authority for saying that the conduct of the parties to a written contract is alone admissible evidence to withdraw the construction of a word therein of a settled primary meaning from the Judge, and to transfer it to the jury.”

When for jury.

It would have appeared needless to remark that the same sense is to be put upon the words of a contract in an instrument under seal, as would be put upon the same words in any instrument not under seal, if the question had not actually been

Immaterial whether under seal or not.

(*o*) *Goldshede v. Swan*, 1 Exch. 154; *Walker v. Hunter*, 2 C. B. 324; *Bacon's Maxims*, Reg. 10; *Mallan v. May*, 13 M. & W. 511; *Beckford v. Critwell*, 1 M. & R. 187.

& Ad. 728; *Grant v. Maddox*, 15 M. & W. 737; *Myers v. Sarle*, 30 L. J. (Q. B.) 9.

(*q*) *Robertson v. Jackson*, 2 C. B. 412; *Bourne v. Gatliff*, 11 Cl. & F. 45. See *Hitchin v. Groom*, 5 C. B. 515.

(*p*) *Smith v. Wilson*, 3 B.

Or in what
court the
writing is
construed.

raised in argument ; for the same intention will be expressed by the same words in a contract in writing whether with or without seal. Nor can it signify in what court the instrument is construed ; for the question, what is the meaning of the contract, cannot be affected by the question, what is to be the consequence of the contract, or what the remedy for the breach, or by any other matter in which the *practice* of the courts may differ. The rule of construction, therefore, must be the same, whether in a civil or a criminal court, or whether in a court of law or equity.

Whole agree-
ment to be
considered.

In the first place, it is the most important of all the rules of construction, that the whole of the agreement is to be considered. This is so reasonable and clear, that no explanation is required of it; for obviously it cannot be the intention of the parties to an agreement, with stipulations or qualifications, that some of them should be altogether disregarded, and a part of the agreement magnified into an equality with the whole ; but, on the contrary, such a meaning is to be given to particular parts as will, without violence to the words, be consistent with all the rest, and with the evident object and intention of the contracting parties.

The recent case of *Monypenny v. Monypenny* (r), decided by Lord Chancellor *Chelmsford*, contains

(r) 28 L. J. (Ch.) 303 ; 31 L. J. (C. P.) 254 ; 14 C. L. J. (Ch.) 269 ; and 9 H. L. B. (N. S.) 654.
C. 114 ; *M'Intyre v. Belcher*,

one of the most luminous judgments to be found in the books on this most important rule, and deserves so much attention that I have here stated it at some length. Phillips Monypenny vested a term of 100 years in trustees for the better security of the payment of a rent-charge, being his wife's jointure. Phillips Monypenny died in 1841. After his death it was discovered that of the principal part of the property charged with the annuity, Phillips Monypenny was only tenant for life, and on his death it became another's. As the charge upon the land of which he was such tenant ceased, it became material to inquire whether there was any covenant in the deed to bind his personal representatives. One of the Vice-Chancellors, assisted by two of the Common Law Judges, decided that there was no such covenant, and the case was re-considered, on appeal, by Lord Chancellor *Chelmsford*.

"The learned barons," said the Lord Chancellor, "who assisted the Vice-Chancellor in putting a legal construction on the deed, were clearly of opinion that there were no words in it creating a covenant. They examined the recital, grant, and the power of distress in succession, and dismissed each of them in its turn, with the remark that it did not operate as a covenant. Even the strong and appropriate words used in the creation of the power to distrain did not shake their opinion; for as to them they say, 'Nor do we think that the

words used in the creation of the power to distrain, extensive as they are,'—'covenants, grants, and 'agrees, that it shall be lawful when the rent-charge is in arrear for the grantee to distrain on 'the premises,'—are an express covenant that he shall have power to do so. We think that 'covenants and agrees' mean no more than 'grants.' Then the learned judges proceeded to inquire whether there is any implied covenant arising out of the general words used by the grantor, and properly observe that such a covenant must be a covenant at law, and that there cannot be a covenant implied from such words; that the covenantor had an equitable estate; and they conclude that the deed contains neither an express nor an implied covenant, of which the claimant can avail herself to enforce the payment of her jointure (*i. e.*, the charge on the land). After the most careful consideration *of every part of the deed*, I cannot bring my mind to a similar conclusion. In the course of the argument of the counsel against the claim, I have been earnestly requested to examine the whole scheme of the deed, in order to be enabled to put a satisfactory construction upon those parts of it which involve the question to be decided. Undoubtedly, as Sheppard says (*Touchstone*, 87), in the construction of all parts of all kinds of deeds, amongst the rules to be universally observed is one, 'that the construction be made upon the entire deed, and that one part of it doth help to expound another,

and that every word (if it may be) may take effect and none be rejected.' Where words are ambiguous, or the intention is not manifest and plain, it is useful and necessary to recur to other parts of the deed for interpretation: but this mode of construction is frequently invoked for the purpose of giving a different meaning to words from that which they ordinarily bear; and on the present occasion the assistance of the whole scheme of the deed seems to be used, not that every word may take effect, but for the purpose of weakening the appropriate words. It is unnecessary, in my opinion, to resort to any more of the deed, except to observe that the marriage consideration runs through every part of it. It was clearly to Phillips Monypenny's interest that Mrs. Monypenny should have a rent-charge out of his estate, and he believed himself to be the absolute owner of it. The deed, therefore, contains a recital that, 'upon the treaty for the marriage he had agreed to secure to her an annual sum or rent-charge, to be issuing and payable out of the manors and other hereditaments charged therewith, and of or to which he the said Phillips Monypenny is entitled or seised in fee simple;' and in the granting part, 'he gives and grants the annual sum or rent-charge to be issuing out of certain manors and lands, and generally out of messuages, lands, tenements, and hereditaments in the several parishes in the county of Kent, of or to which he or any person or persons in trust for him is or are

seised or entitled for an estate of inheritance at law or in equity.' It is said that the alternate words in the recital and in the 'grant' express an uncertainty as to the nature of the title of Phillips Monypenny to the estates charged: and that, according to the case of *Right d. Jefferys v. Bucknell (s)*, they created no estoppel against Phillips Monypenny. But in that case the question related to two houses only, which were mortgaged, and the deed reciting that the mortgagor was legally or equitably entitled to the premises, and he covenanting that he was legally or equitably seised in his own demesne as of fee, it was clear that there was no certain or precise averment of any seisin in him. There the charge was intended to apply to various lands of the grantor; and as it is an undoubted canon of construction, that, if possible, you should give effect to every part of a deed, I find no difficulty in considering the words, both in the recital and in the grant, not as expressive of any uncertainty, but as applying to lands held by different titles, and therefore *reddendo singula singulis* to all the lands mentioned, whether Phillips Monypenny was legally or equitably entitled to them. The effect of this mode of reading the recital and the grant will be, that the annuity will be a charge upon all the land, whether Phillips Monypenny's title to them was legal or

(s) 2 B. & Ad. 278.

equitable, although the power to distrain would be limited to those only of which he had the legal estate. The converse of this is put by Lord *Coke* in p. 47 of his *Commentary*, where he says: 'If a man seised of lands in fee, and possessed of a term for many years, grant a rent out of both for life in tail or in fee, with clause of distress out of both, this rent, being a freehold, doth issue only out of the freehold, and the lands in lease are only charged with the distress.' It will be said that the words 'give, grant, bargain, and sell,' cannot operate as a covenant, because they merely assert a power to give or create an annuity; at the same time, the plain and ordinary effect of the word 'covenant' has been denied, and it has been treated as synonymous with the word 'grant.' But in construing this deed I should be much more disposed to give the word 'grant' the operation of a covenant than to transform the word 'covenant' into a grant. It is undoubtedly law, that a deed that is intended and made to one purpose may accrue to another; for if it would not take effect in the way that it was intended, it may take effect another way: *Sheppard's Touchstone*, 82. There is an admirable judgment of Lord Chief Justice *Willes* on this subject, in *Roe d. Wilkinson v. Tranmarr* (t), which has a considerable bearing on the point in question. There Thomas Kirkley, in consideration

(t) *Willes*, 682; 2 Smith L. C., 5th ed.

of natural love to his brother Christopher, and for £100., granted, released, and confirmed to Christopher the premises in question after his (Thomas's) death, and covenanted and granted that the premises should after his death be held by Christopher and the heirs of his body, and after their decease, to John Wilkinson and his heirs; and it was held that the deed would not operate as a release because it attempted to convey a freehold in future, but that it was good as a covenant to stand seised: and the Chief Justice said, 'there is likewise one thing in the present case much stronger than in any of the cases which have been cited on the one side or the other, for here is not only the word 'grant,' which has often been construed as a word of covenant, but likewise the grantor expressly covenants in two places in the deed, that the estate shall go to John Wilkinson in such a manner as he granted it.' In the present case, if the words creating the annual sum or yearly rent-charge are to be construed strictly as a grant and nothing more, then it was absolutely void from the first and never could have any inception, because it was not to begin until after the death of Phillips Monypenny, and, on his death, the estate on which it is charged came to an end. Why, under these circumstances, it being the clear intention of those parties that the deed should operate, if it could not take effect as a charge, should it not be construed to be a covenant to pay the annual sum of £300., which would be

binding upon the executors of Phillips Monypenny, though not named? It is unnecessary to multiply authorities to show that, according to what Lord *Mansfield* says, in *Lant v. Morris* (u), 'no particular technical words are requisite towards making a covenant,' for in this deed there is a clause in which this peculiar and appropriate word is to be found in giving the grantor power to distrain for the rent-charge—'Phillips Monypenny, for himself, his heirs, and assigns, covenants, grants, and agrees.' I asked more than once in the course of the argument, what would have been the effect of the deed if it had simply contained this clause of distress? I was not aware my question almost received an answer from Littleton himself; for he says, in the course of section 221: 'Also, if one make a deed in this manner, that if A., of B., be not yearly paid at the feast of Christmas, for the term of his life, twenty shillings of lawful money, that then it shall be lawful for the said A., of B., to distrain for this in the manor of F., &c.: this is a good rent-charge, because the manor is charged with the rent by way of a distress.' But he adds—'And yet the person of him who makes such deed is discharged in the case of an action of annuity, because he doth not grant by his deed any annuity to the said A., of B., but granteth only that he may distrain for such annuity.' Now upon this, put the case that a per-

(u) 1 Burr. 290.

son 'covenants, grants, and agrees' for a power of distress for an annual sum of rent-charge upon land in which he has nothing. If it is a rule that every word in a deed must have effect given to it if possible, and none ought to be rejected, and there is another rule that if a deed cannot take effect in the way intended it shall take effect in another way,—why should not these words have each its due effect, and after the creation of the rent-charge by the grant of the power of distress, why should not the covenant applied to the words 'annual sum' create a personal liability in the grantor and his executors? I am aware that the grantor in this clause of distress binds only his heirs and assigns, and not his executors; and it was insisted, though not very strongly, in argument, that this showed an intention that his executors should not be bound. I inquired whether there was any authority to be found that executors in such a case would not be liable, and I was told that none had been discovered; and I should have been surprised to have learnt that, the rule being that heirs are in general only bound if named, and that executors are bound although not named, the naming the heirs for the purpose of binding them should be considered to amount to an exclusion of the executors, whom it was unnecessary to name. But had there been any such authority, I should have thought it inapplicable to the present case, in which, there being no heirs to be

bound, as there was nothing to descend, the naming them could have no greater effect than if they had been altogether omitted from the covenant.

"It is not necessary for me to consider the question as to whether a covenant could have been implied from the words of the deed, if there had been no express covenant. I proceed on the covenant which I consider to be expressly created by the language of the parties. I think the appeal must be allowed, and the claim allowed also."

This rule has been so admirably illustrated by another very recent case, that I have inserted the most material facts and arguments used in it, in applying and limiting the rule. This is the case of *Piggott v. Stratton*, decided by the Court of Appeal in Chancery, and is as follows:—

In 1845, Sir R. Simeon demised to William Stratton three pieces of land marked A., B., and C., Stratton covenanting not to build on the piece marked C., except in a certain manner, which would leave intervals giving a sea-view to houses built on the piece marked B. Stratton granted an underlease of part of B. to one Harbour, and by the underlease covenanted to observe his own covenants in the original lease, and effectually to indemnify the underlessee, his executors, administrators, and assigns therefrom. Harbour sold and assigned his underlease to the plaintiff. Stratton afterwards surrendered the original lease, obtained

another not containing the restrictive covenants, and proceeded to build on C. in a manner which would exclude the houses on B. from the sea-view. The Lord Chancellor *Campbell*, sitting in the Full Court of Appeal, decided that the covenants in the underlease to observe those in the original lease, had the same effect as if they had been repeated in the underlease, notwithstanding that the lease was surrendered; and an injunction was granted to prevent Stratton from violating them (x).

“The first question,” said Lord *Campbell*, “depends upon whether Stratton is to be considered, after surrendering to Sir Richard Simeon the lease of 1845, as under a covenant to Harbour not to build houses on the land marked C. in that lease, so as to obstruct the sea-view from houses built on the land marked B., and depends entirely upon the construction of the underlease of 1851 from Stratton to Harbour, regard being had to certain facts then existing. These facts are, that by the lease of 1845 Sir R. Simeon had demised for 999 years a part of his estate in the Isle of Wight, on the Solent, consisting of three plots marked A., B., and C., and Stratton had covenanted that he would not build houses on C. without a certain interval between them, which would have permitted a sea-view across C. from houses built on B.; that in the

(x) *Piggott v. Stratton*, 29 L. J. (Ch.) 1.

year 1851 Stratton proposed to underlet to Harbour for 970 years a considerable portion of the plot marked B. for the purpose of building marine villas upon it; and that the value of such land depends materially upon the houses to be erected upon it having a view of the sea. Under these circumstances, the underlease of 1851 was executed, containing a covenant by Stratton with Harbour, by which, after a recital of the lease of 1845, Stratton, for himself, his heirs, executors, administrators, and assigns, covenanted with Harbour, his executors, administrators, and assigns, that he, Stratton, his executors, administrators, and assigns would thenceforth observe the lessee's covenant contained in the same lease. The underlease does not repeat the words of the covenant in the lease as to the interval to be left between the houses to be built on C. But *verba relata inesse videntur*; and, according to the dictum of *Parke, B.*, in *Doughty v. Bowman* (y), 'A covenant to perform the covenants of a lease, has no other effect than if the former covenants had been inserted.' I conceive, therefore, that this covenant in the underlease was tantamount to a covenant by Stratton, for himself, his heirs, executors, administrators, and assigns, not to build houses on C. without leaving the stipulated interval between them. Is not this covenant still binding upon Stratton. He

(y) 11 Q. B. 454.

admits that it was binding on him until he surrendered the lease of 1845, and that until then an injunction might have been obtained by Harbour against his building houses on C. contrary to the covenant. He now relies upon the surrender. I entirely concur in the general maxim, that a covenant to perform the covenants of a lease, is only binding during the subsistence of the lease ; but, *looking to the covenant in this underlease*, it is evident to me that the parties *intended* that, in as far as it conferred any benefit upon Harbour, it should remain in force during the currency of the underlease. Harbour acquired a material benefit by Stratton's covenant with him to perform the covenant in the lease from Sir R. Simeon as to the mode in which the houses were to be erected between B. and the margin of the Solent. It cannot properly be called an easement or servitude over C. But Harbour acquired a right to an immunity which materially enhanced the value of the land which was sub-let to him, and restrained the use of part of the land demised to Stratton. If there had been in the underlease a direct, express, or specific covenant by Stratton that, during the currency of the underlease, he would not build upon C. so as to injure the prospect from B., it was not contended that this covenant would have been affected by the surrender. But I conceive that the covenant to perform all the covenants in the lease which contained such a covenant, is exactly equiva-

lent. When Stratton had sub-let B., at the same time restraining the mode of enjoying C. during the currency of the underlease, he could not by any surrender derogate from the right which Harbour had acquired. Harbour was a stranger to the surrender, and could not be prejudiced by it.

“If Stratton, before the surrender of the lease of 1845, is supposed to have covenanted in the underlease to Harbour so as to give Harbour an interest in any part of the land devised by the lease of 1845, upon that interest the subsequent surrender could have no operation. That such was the intention of the parties when the underlease of 1851 was executed, I cannot doubt, and I think that this *intention* is sufficiently *manifested by the language they have employed*.

“To get at the intention of covenants it is not necessary to look for any technical form of words. The principles upon which covenants are to be construed are elaborately and lucidly laid down and illustrated in the judgment of Lord Chancellor *Chelmsford* in the case of *Monypenny v. Monypenny*, in which he overruled (I think very properly) the judgment of two Common Law Judges, who had departed from these principles.”

The few strong expressions used by Lord *Tenterden* in the case of *Doe d. Bywater v. Brandling* (z), as to the mode of construing Acts of

(z) 7 B. & C. 660.

Parliament, are equally applicable to the mode of construing contracts ; and their reasonableness will appear from the mere enunciation of them :—
“ We are to look, not only at the language of the preamble or of any particular clause, but at the language of the whole Act ; and if we find in the preamble or in any particular clause, an expression not so large and extensive in its import as those used in other parts of the Act, and upon a view of the whole Act we can collect from the more large and extensive expressions used in other parts the real intention of the Legislature, it is our duty to give effect to the larger expressions, notwithstanding the phrases of less extensive import in the preamble or in any particular clause.” In like manner general words may be restrained by the recital, where it is evident from the whole agreement that they were intended to apply to the matter recited. Thus, a deed recited that disputes were subsisting between Simons and Johnson, about which actions at law had been brought, and that it had been agreed, in order to put an end thereto, that each of them should execute a release of all actions and causes of action, claims, and demands which each of them then had or might claim by reason of anything whatsoever. “ I cannot read this,” said Lord *Tenterden*, “ without seeing that the release which follows was intended to apply to the matter recited, namely, the actions then depending, and that the object was to put an end to them. The generality

of the language was therefore to be confined by the recital " (a).

An important instance of the rule which we have been considering, is, that where general words follow others of more particular meaning, they are to be construed as applicable to things *ejusdem generis* with the former particular words (b). Thus, an action was brought upon a policy of insurance in the ordinary form, wherein the perils which the insurers were to bear are stated to be " of the sea, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detentions of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandize and ship, &c., or any part thereof." The facts of the case were, that the ship and goods had been sunk at sea by another and friendly vessel firing upon her, mistaking her for an enemy; and the question was, whether the injury was within the general words with which the perils

Words *ejusdem generis*.

(a) *Simons v. Johnson*, 3 Exch. 739, S. C.; *Jones v. B. & Ad.* 175; *Payler v. Homersham*, 4 M. & Sel. 423. *Nicholson*, 23 L. J. (Ex.) 330; 10 Exch. 28, S. C.; *Lozano v. Janson*, 28 L. J. (Q. B.) 337.

(b) *Cullen v. Butler*, 5 M. & Sel. 461; *Naylor v. Palmer*, 22 L. J. (Ex.) 329; 8

enumerated were concluded. The Court decided that the assured was entitled to recover, as the loss was of the same kind as the perils expressly mentioned, and was, therefore, within the general terms. The Court of Queen's Bench, whose judgment was delivered by Lord *Ellenborough*, considered, in opposition to an argument on the part of the plaintiff, that it was a loss by perils of the sea, merely because it happened there; that all the other causes of loss specified in the policy were upon that ground equally entitled so to be considered, and it would be unnecessary ever to assign any other cause of loss than a loss *by* perils of the sea; but, the Court continued, as that has not been the understanding and practice on the subject hitherto, and inasmuch as the very insertion of the general or sweeping words, as they are called, in the policy after the special words imports that the special words were not understood to include all perils happening on the sea, but that some more general words were required to be added in order to extend the responsibility of the underwriters unequivocally to other risks not included within the proper scope of any of these enumerated perils. "I shall think it necessary," said Lord *Ellenborough*, "only to advert shortly to some of the reasons upon which we think that the general words thus inserted comprehend a loss of this nature. The extent and meaning of the general words have not yet been the immediate

subject of any judicial construction in our courts of law. As they must, however, be considered as introduced into the policy in furtherance of the objects of marine insurance, and may have the effect of extending a reasonable indemnity to many cases not distinctly covered by the special words, they are entitled to be considered as material and operative words, and to have the due effect assigned to them in the construction of this instrument ; which will be done by allowing them to comprehend and cover other cases of marine damage of the like kind with those which are specially enumerated and occasioned by similar causes (c)."

Another very clear example (d) of the same rule is afforded by a case where a ship loaded with corn, being forced by stress of weather into Elly harbour, in Ireland, and there happening to be a great scarcity of corn there at the time, the people came on board the ship in a tumultuous manner, took the government of her, and suffered her to drive on rocks, where she was stranded. The question was, whether she was detained by people as in the policy above mentioned. "The word people," said Mr. Justice *Buller*, "in the policy means the supreme power, the power of the country, whatever it may be. This appears clear from another part of the policy ; for when the underwriters insure against the wrongful acts of individuals, they

(c) *Cullen v. Butler*, supra. T. R. 783 ; *Glaholm v. Hays*,

(d) *Nesbitt v. Lushington*, 4 2 M. & Gr. 257.

describe them by the names of pirates, rovers, thieves; then, having stated all the individual persons against whose acts they engage, they mention other risks, those occasioned by the acts of kings, princes, and people of what nation, condition, or quality soever. These words, therefore, must apply to nations in their collective capacity."

Place, time,
subject-matter,
&c., to be
considered.

It is obvious, that, if the whole of the agreement is to be considered, the place where it was made (*e*), the time when, the object of the parties, and the department of science or art, trade or commerce, to which the subject-matter of it belongs, must be regarded; for, otherwise, the meaning of words which have peculiar acceptations at different times and places, and in relation to different subject-matters, cannot be accurately understood. But bearing in mind these observations as to the peculiar meaning which words sometimes bear, and to the context of the whole contract, the usual and proper mode of understanding words is according to their ordinary sense and meaning. Of this mode, the case of *Barton v. Fitzgerald* (*f*), is a strong instance. In this case the defendant by deed, reciting a lease for the term of ten years, which by several assignments had come to him, and that the plaintiff had contracted for the absolute purchase of the premises, assigned them to the plaintiff for the residue of the term in as ample a

Words to be
understood in
their ordinary
sense.

(*e*) See *Pust v. Dowie*, 33 L. J. (Q. B.) 172. (*f*) 15 East, 530.

manner as he held the same, and covenanted that it was a good and subsisting lease, valid in law, and not forfeited or otherwise determined or become void or voidable. The fault was, that the original lease was for ten years determinable on a life which fell before the ten years expired, but after this assignment to the plaintiff. And the Court held, that the plain and absolute terms of the covenant must have their full meaning, and that consequently it had been broken by the defendant; although there was another covenant against incumbrances confined to such as were created by the defendant, and those who might claim under him, and a covenant for quiet enjoyment restrained in the same manner (g). Another instructive instance of the rule of giving to each word its ordinary and popular meaning as evidently affected by the context or circumstances before mentioned, is furnished by the case of *Lord Dormer v. Knight* (h), in which a deed had been executed by the defendant, granting an annuity for the use of his wife; provided that, if she should associate, continue to keep company with, or cohabit, or criminally correspond with a person named, the annuity should cease. It was held, that all intercourse, however innocent, was prohibited, "The words of the deed," said the Court, "are as general as can be, and go much further than the exclusion of criminal co-

(g) See *Worthington v. Warrington*, 5 C. B. 635. (h) 1 Taunt. 417.

habitation. The intention was to put a stop to all intercourse whatever between these two persons. The receiving a person's visits whenever he chooses to call, is associating with him. The parties have chosen to express themselves in these terms, and the words must receive their common meaning and acceptation." In like manner, where a warrant of attorney had been given to the plaintiff by the defendant, but it was agreed not to enter up judgment upon it unless the defendant should dispose of his business, or become bankrupt or insolvent, it was held, that the latter words meant a general inability to pay his debts, and not merely his having recourse to the protection of the Insolvent Courts (i).

But a very little consideration will show that the rule of understanding the words and sentences in their ordinary meaning, when it is not restrained by the context, is perfectly consistent with the rule that the whole context is to be considered; which is, indeed, the just rule of interpretation, and is very conveniently couched in the ancient maxim of the law, *Ex antecedentibus et consequentibus fit optima interpretatio* (k).

These are the principal rules for the construction of contracts. There are others, less general, which are sometimes referred to. They will be found

(i) *Biddlecombe v. Bond*, 4 Ad. & E. 332. *Coles v. Hulme*, 8 B. & C. 568.

(k) 1 Shep. Touch. 87 ;

very clearly treated of in Broom's Maxims, last edition; and both these, and the more general rules which it has been attempted to illustrate in this volume, are explained at large in Sheppard's Touchstone; in which book, indeed, many of the topics treated of in these Lectures will be found explained in the most scientific and masterly manner.

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